

3-1-2010

Twin Lakes Canal Co. v. Choules Clerk's Record v. 1 Dckt. 37058

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Vol. 1 of 3

**IN THE
SUPREME COURT
OF THE
STATE OF IDAHO**

TWIN LAKES CANAL COMPANY CO.

Plaintiff/Appellants

vs. **LAW CLERK**

WARREN CHOULES and SESSILEE J. CHOULES

Defendants/Respondents

MITCHELL W. BROWN District Judge

Appealed from the District Court of the SIXTH
Judicial District of the State of Idaho, in and for

FRANKLIN County.

ROBERT L. HARRIS

Attorney for APPELLANT

BLAKE S. ATKIN

Attorney for RESPONDENT

FILED - COPY
Filed this _____ day of _____
MAR - 1 2010

Supreme Court _____ Court of Appeals _____
Entered on file by _____

Clerk

Deputy

37058

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * *

TWIN LAKES CANAL COMPANY, an
Idaho Corporation,

Plaintiff/Appellants,

vs.

WARREN CHOULES, an individual, and,
SESSILEE J. CHOULES, as Trustee of
the Choules Family Trust,

Defendants/Respondents.

Supreme Court No. 37058-2009

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Sixth Judicial District
of the State of Idaho, in and for the County of Franklin

Honorable MITCHELL W. BROWN
District Judge

APPEARANCES:

Robert L. Harris
Attorney for Appellant
PO Box 50130
Idaho Falls, ID 83405-0130

Blake S. Atkin
Attorney for Respondent
837 South 500 West, Ste. 200
Bountiful, UT 84010

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Twin Lakes Canal Company vs. Warren Choules, Sessilee J Choules

Date	Code	User	Judge
7/23/2008	NCOC	KROBINSON	New Case Filed - Other Claims Don L Harding
	SMIS	KROBINSON	Summons Issued-Warren Choules Don L Harding
		KROBINSON	Filing: A - Civil Complaint for more than \$1,000.00 Paid by: Twin Lakes Canal Company (plaintiff) Receipt number: 0002317 Dated: 7/23/2008 Amount: \$88.00 (Check) For: Twin Lakes Canal Company (plaintiff) Don L Harding
	SMIS	HAMPTON	Summons Issued-Sessilee Choules Don L Harding
	MOTN	HAMPTON	Motion for Preliminary Injunction and for Expedited Notice of Hearing Don L Harding
	NOTC	HAMPTON	Notice of Hearing on Motion for Preliminary Injunction and to Shorten Time for Notice of Hearing Don L Harding
	HRSC	HAMPTON	Hearing Scheduled (Motion for Preliminary Injunction 08/14/2008 02:30 PM) Don L Harding
	APER	HAMPTON	Plaintiff: Twin Lakes Canal Company Appearance Robert L. Harris Don L Harding
8/11/2008	MOTN	HAMPTON	Motion to Dismiss for Failure to State a Claim Upon Which a Claim for Relief Can be Granted-Atkin Don L Harding
8/14/2008	CMIN	HAMPTON	Court Minutes Hearing type: Motion for Preliminary Injunction Hearing date: 8/14/2008 Time: 02:50 PM Court reporter: Dorothy Snarr Don L Harding
	HRHD	HAMPTON	Hearing result for Motion for Preliminary Injunction held on 08/14/2008 02:30 PM: Hearing Held Don L Harding
8/15/2008	BNDC	HAMPTON	Bond Posted - Cash (Receipt 2604 Dated 8/15/2008 for 5000.00) Don L Harding
	HRSC	HAMPTON	Hearing Scheduled (Motion 09/04/2008 01:00 PM) Motion for Preliminary Injunction Don L Harding
8/18/2008	CONT	HAMPTON	Continued (Motion 09/04/2008 09:00 AM) Motion for Preliminary Injunction Don L Harding
	MEOR	HAMPTON	Minute Entry And Order Don L Harding
8/26/2008	AMCO	HAMPTON	Amended Complaint Filed Don L Harding
9/4/2008	CMIN	HAMPTON	Court Minutes Hearing type: Motion for Preliminary Injuncture Hearing date: 9/4/2008 Time: 9:00 am Court reporter: Dorothy Snarr Don L Harding
	BREF	HAMPTON	Twin Lakes Canal Company's Brief Regarding IC5-246 Don L Harding
	MEOR	HAMPTON	Minute Entry And Order Don L Harding
	DCHH	HAMPTON	Hearing result for Motion held on 09/04/2008 09:00 AM: District Court Hearing Held Court Reporter: Dorothy Snarr Number of Transcript Pages for this hearing estimated: Less 100 Don L Harding

Twin Lakes Canal Company vs. Warren Choules, Sessilee J Choules

Date	Code	User	Judge
9/5/2008	MOTN	HAMPTON	Motion to Dismiss Amended Verified Complaint for Failure to State a Claim Upon which Relief may be Granted
10/1/2008	CHJG	HAMPTON	Change Assigned Judge (batch process)
10/27/2008	NOTC	HAMPTON	Notice of Hearing on Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted-Atkin
11/6/2008	HRSC	HAMPTON	Hearing Scheduled (Motion to Dismiss 12/11/2008 02:45 PM)
11/25/2008	MEMO	HAMPTON	Defendants' Memorandum in Support of Motion to Dismiss Damage Claims-Atkin
12/10/2008	HRVC	HAMPTON	Hearing result for Motion to Dismiss held on 12/11/2008 02:45 PM: Hearing Vacated
	HRSC	HAMPTON	Hearing Scheduled (Status 12/11/2008 02:45 PM) Phone Conference
12/11/2008		KJONES	Filing: 17 - All Other Cases Paid by: Blake Atkin Receipt number: 0003988 Dated: 12/11/2008 Amount: \$58.00 (Check) For: Choules, Warren (defendant)
	APER	HAMPTON	Defendant: Choules, Warren Appearance Blake S. Atkin
	APER	HAMPTON	Defendant: Choules, Sessilee J Appearance Blake S. Atkin
	HRHD	HAMPTON	Hearing result for Status held on 12/11/2008 02:45 PM: Hearing Held Phone Conference
12/17/2008	APER	HAMPTON	Defendant: Choules, Warren Appearance Michael C Moore
	APER	HAMPTON	Defendant: Choules, Sessilee J Appearance Michael C Moore
	NOAP	HAMPTON	Notice Of Appearance from Michael Moore
12/22/2008	HRSC	HAMPTON	Hearing Scheduled (Motion to Dismiss 02/12/2009 03:00 PM)
12/24/2008	MEMO	HAMPTON	Memorandum in Opposition to Defendants' Motion to Dismiss-Harris
	AFFD	HAMPTON	Affidavit of Daniel C. Dansie-Harris
12/31/2008	MEOR	HAMPTON	Minute Entry And Order
1/8/2009	NOTC	HAMPTON	Notice of Hearing on Motion to Dismiss-Atkin
1/16/2009	NOTC	HAMPTON	Notice of Hearing on Motion to Dismiss-Atkin
2/9/2009	REPL	HAMPTON	Defendants' Reply Brief in Support of Motion to Dismiss Damage Claims-Moore
2/12/2009	DCHH	HAMPTON	Hearing result for Motion to Dismiss held on 02/12/2009 03:00 PM: District Court Hearing Held Court Reporter: Dorothy Snarr Number of Transcript Pages for this hearing estimated: less than 100 pages
	MEOR	HAMPTON	Minute Entry And Order

Twin Lakes Canal Company vs. Warren Choules, Sessilee J Choules

Date	Code	User	Judge
2/19/2009	ANSW	HAMPTON	Defendants' Answer to Plaintiff's Amended Verified Complaint-Kraft
3/23/2009	MEMO	HAMPTON	Memorandum Decision and Order on Defendants' Motion to Dismiss
4/1/2009	HRSC	HAMPTON	Hearing Scheduled (Status 04/23/2009 03:00 PM)
4/8/2009	MEMO	HAMPTON	Defendants' Memorandum in Support of Motion for Attorney Fees-Kraft
	MOTN	HAMPTON	Defendants' Motion for Costs and Attorney's Fees-Kraft
	AFFD	HAMPTON	Affidavit of Counsel in Support of Request for Costs and Fees-Kraft
	MEMO	HAMPTON	Defendants' Memorandum of Costs and Attorney's Fees-Kraft
	AFFD	HAMPTON	Affidavit of Attorney Fees of Blake S. Atkin-Atkin
	HRSC	HAMPTON	Hearing Scheduled (Motion for Attorney fees and Costs 04/23/2009 03:00 PM)
	NOTC	HAMPTON	Notice of Hearing-Kraft
4/16/2009	MOTN	HAMPTON	Motion to Shorten Time-Harris
	MOTN	HAMPTON	Motion for Certification Pursuant to IRCP 54(b)-Harris
	MEMO	HAMPTON	Memorandum in Support of Motion for Certification Pursuant to IRCP 54(b)-Harris
4/17/2009	AFFD	HAMPTON	Affidavit of Attorney Robert L. Harris-Harris
	OBJC	HAMPTON	Plaintiff's Objection to Defendant's Motion for Costs and Attorney's Fees - Harris
	NOTC	HAMPTON	Notice of Errata on Twin Lakes' Memorandum in Support of Certification Pursuant to IRCP 54(b)-Harris
	MOTN	HAMPTON	Motion to Shorten Time-Kraft
	MOTN	HAMPTON	Motion to Increase Bond-Kraft
4/21/2009	REPL	HAMPTON	Defendants' Reply Brief in Support of Motion for Costs and Attorney Fees-Kraft
	MEMO	HAMPTON	Memorandum in Opposition to Motion to Increase Bond-Harris
4/23/2009	CMIN	HAMPTON	Court Minutes Hearing type: Motions Hearing date: 4/23/2009 Time: 3:55 pm Court reporter: Dorothy Snarr
	DCHH	HAMPTON	Hearing result for Motion for Attorney fees and Costs held on 04/23/2009 03:00 PM: District Court Hearing Held Court Reporter: Dorothy Snarr Number of Transcript Pages for this hearing estimated: less than 100 pages
	MEOR	HAMPTON	Minute Entry And Order

Twin Lakes Canal Company vs. Warren Choules, Sessilee J Choules

Date	Code	User	Judge
4/29/2009	AFFD	HAMPTON	Supplemental Affidavit of Attorney Fees of Blake S. Atkin
4/30/2009	HRSC	HAMPTON	Hearing Scheduled (Scheduling Conference 05/07/2009 03:00 PM)
5/5/2009	HRSC	HAMPTON	Hearing Scheduled (Status 05/28/2009 01:30 PM)
5/12/2009	ORDR	HAMPTON	Order
5/28/2009	HRVC	HAMPTON	Hearing result for Status held on 05/28/2009 01:30 PM: Hearing Vacated
6/1/2009	HRSC	HAMPTON	Hearing Scheduled (Status 06/25/2009 01:30 PM)
6/25/2009	HRVC	HAMPTON	Hearing result for Status held on 06/25/2009 01:30 PM: Hearing Vacated
8/7/2009	HRSC	HAMPTON	Hearing Scheduled (Status 08/18/2009 03:00 PM)
8/17/2009	CONT	HAMPTON	Hearing result for Status held on 08/18/2009 03:00 PM: Continued
	HRSC	HAMPTON	Hearing Scheduled (Status 08/24/2009 01:30 PM)
8/24/2009	CMIN	HAMPTON	Court Minutes Hearing type: Status Hearing date: 8/24/2009 Time: 1:30 pm Courtroom: Telephonic Court reporter: Dorothy Snarr Minutes Clerk: Linda HAMPTON Tape Number: Blake Atkin Rob Harris Steven Kraft
	DCHH	HAMPTON	Hearing result for Status held on 08/24/2009 01:30 PM: District Court Hearing Held Court Reporter: Dorothy Snarr Number of Transcript Pages for this hearing estimated: less than 100 pages
	MEOR	HAMPTON	Minute Entry And Order
9/3/2009	STIP	HAMPTON	Stipulation for Certification Pursuant to IRCP 54(b)-Harris
9/4/2009	ORDR	HAMPTON	Order for Certification Pursuant to IRCP 54(b)
10/2/2009		HAMPTON	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Harris, Robert L. (attorney for Twin Lakes Canal Company) Receipt number: 0007230 Dated: 10/2/2009 Amount: \$101.00 (Check) For: Twin Lakes Canal Company (plaintiff)
	APSC	HAMPTON	Appealed To The Supreme Court
	STAT	HAMPTON	Case Status Changed: Inactive
	NOTA	HAMPTON	NOTICE OF APPEAL

Date: 1/18/2010

Sixth Judicial District Court - Franklin County

User: HAMPTON

Time: 03:28 PM

ROA Report

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Case: CV-2008-0000275 Current Judge: Mitchell W. Brown

Twin Lakes Canal Company vs. Warren Choules, etal.

Twin Lakes Canal Company vs. Warren Choules, Sessilee J Choules

Date	Code	User		Judge
10/2/2009	BNDC	HAMPTON	Bond Posted - Cash (Receipt 7235 Dated 10/2/2009 for 100.00)	Mitchell W. Brown
10/5/2009	CCOA	HAMPTON	Clerk's Certificate Of Appeal faxed to Idaho Supreme Court	Mitchell W. Brown
10/23/2009	MISC	HAMPTON	Mailed Clerk's Certificate of Appeal along with documents appealed to the Supreme Court. Notified by Supreme Court they had not received notice of this appeal.	Mitchell W. Brown
11/10/2009	AMEN	HAMPTON	AMENDED Notice of Appeal	Mitchell W. Brown
11/16/2009	CCOA	HAMPTON	Clerk's Certificate Of Appeal - AMENDED	Mitchell W. Brown

Robert L. Harris, Esq. (ISB #7018)
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1000 Riverwalk Drive, Suite 200
Idaho Falls, Idaho 83402
P.O. Box 50130
Idaho Falls, Idaho 83405-0130
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

FILED

08 JUL 23 PM 2:22

FRANKLIN COUNTY CLERK

[Signature]
DEPUTY

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

TWIN LAKES CANAL COMPANY, an
Idaho Corporation,

Plaintiff,

vs.

WARREN CHOULES, an individual, and
SESSILEE J. CHOULES, as Trustee of the
Choules Family Trust,

Defendants.

Case No: CV-2008-275

**VERIFIED COMPLAINT AND
REQUEST FOR INJUNCTIVE RELIEF**

Filing Category: A

Filing Fee: \$88.00

Twin Lakes Canal Company ("Twin Lakes"), by and through its attorney of record,
Robert L. Harris, Esq., of HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C., alleges as follows:

STATEMENT OF JURISDICTION

1. Twin Lakes is an Idaho Corporation which provides irrigation water to its shareholders. Twin Lakes owns and operates the Twin Lakes Canal and Twin Lakes Reservoir, both of which are located in Franklin County, Idaho.

2. Defendant Warren Choules resides in Franklin County, Idaho. Defendant Sessilee J.

ORIGINAL

Choules, Trustee of the Choules Family Trust, also resides in Franklin County, Idaho. Defendants are the owners of real property located in Franklin County, Idaho, which is adjacent to the Twin Lakes Reservoir.

3. Venue is proper pursuant to I.C. §§ 5-401 and 5-404.

4. Jurisdiction is proper pursuant to I.C. § 1-705.

STATEMENT OF CLAIMS

5. In 2006, Twin Lakes was awarded a Judgment in Franklin County Case No. CV-04-241 declaring that Twin Lakes owns an “easement to fill the Twin Lakes Reservoir to a gauge height 75.2” on the property owned by the Choules Family Trust.

6. A portion of Defendants’ property is situated below gauge height 75.2 on Twin Lakes Reservoir, and as a result, that portion of Defendants’ property is burdened by Twin Lakes’s easement.

7. In Idaho, “[a] servient landowner may always use the land burdened by the easement, so long as he or she does not interfere with the dominant owner’s full enjoyment of the easement.” *Drew v. Sorensen*, 133 Idaho 534, 541, 989 P.2d 276, 283 (1999).

8. At some point prior to November 2007, Defendants began using heavy equipment to move earth, rocks, concrete, and other debris from elsewhere on their property to areas below gauge height 75.2 in Twin Lakes Reservoir.

9. By moving earth, rocks, concrete, or other debris to areas below gauge height 75.2 on Twin Lakes Reservoir, Defendants reduced the volume of space that Twin Lakes can use to store water.

10. In addition, use of heavy equipment below gauge height 75.2 on Twin Lakes Reservoir

has damaged a clay lining which Twin Lakes installed in the reservoir. The intact clay lining reduces the amount of water that leaks through the soil of the reservoir. When the lining is disturbed, additional water is lost to leakage.

11. Twin Lakes depends on the full use of the water protected by its easement on Twin Lakes Reservoir to satisfy the water needs of its shareholders.

12. Twin Lakes has advised Defendants that their conduct infringes upon Twin Lakes easement. Twin Lakes has attempted to resolve the matter without resorting to litigation. Twin Lakes's engineers sent a letter in November 2007 advising Defendants to cease such work. Also, counsel for Twin Lakes wrote to Defendants in April of 2008 asking him to stop using heavy equipment below gauge height 75.2 on Twin Lakes Reservoir and to refrain from moving earth, rocks, concrete, or other debris below gauge height 75.2.

13. In May 2008, Twin Lakes assisted Defendants in performing some maintenance work below 75.2 level in such a manner that it would not harm Twin Lakes. At that time, Twin Lakes believed it had once again established a good relationship with Defendants, and that Defendants would cease performing unauthorized work below the 75.2 level.

14. Unfortunately, Defendants have continued to perform unauthorized work below the 75.2 gauge height level. Defendants' actions of filling Twin Lakes Reservoir with earth, rocks, concrete or other debris and using heavy equipment below gauge height 75.2 interfere with Twin Lakes's full enjoyment of its easement by diminishing the amount of water available to Twin Lakes and its shareholders.

14. Because full enjoyment of the easement is necessary to satisfy the water needs of Twin Lakes's shareholders, Defendants' actions irreparably harm Twin Lakes.

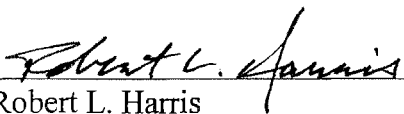
15. Twin Lakes's injury will increase if Defendant continues to move earth, rocks, concrete, or other debris or use heavy equipment below gauge height 75.2 on Twin Lakes Reservoir.

RELIEF REQUESTED

WHEREFORE, Twin Lakes prays for the Judgment, Order and Decree of this Court against Defendants as follows

1. For an immediate hearing to consider the issuance of an injunction against Defendants preventing them from: moving earth, rocks, concrete, or other debris below gauge height 75.2 on Twin Lakes Reservoir; using heavy equipment below gauge height 75.2; or otherwise interfering with Twin Lakes's full use of its easement.
2. For a judgment that Defendant has interfered with Twin Lakes's prescriptive easement.
3. For a permanent injunction preventing Defendant from further interfering with Twin Lakes's prescriptive easement.
4. For damages in an amount to be proven at trial.
5. For attorney fees and costs incurred by Twin Lakes in bringing this action.
6. For such other and further relief as the Court deems just and appropriate.

Dated this 22nd day of July, 2008.


Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

STATE OF IDAHO)
)ss.
County of Bonneville)

CLAIR BOSEN, President of Twin Lakes Canal Company, being first duly sworn,
deposes and says: That he is the Plaintiff in the above-entitled action; that she has read the above
and foregoing VERIFIED COMPLAINT AND REQUEST FOR INJUNCTIVE RELIEF, knows
the contents thereof and that she believes the facts therein stated to be true.

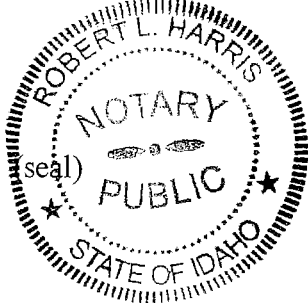
TWIN LAKES CANAL COMPANY

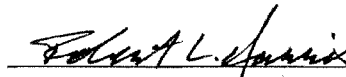


By: Clair Bosen

Its: President

SUBSCRIBED and sworn to before me this 22nd day of July, 2008.




Notary Public for Idaho
Residing at: Ammon, ID
Commission Expires: 11/18/2010

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VERIFIED COMPLAINT AND REQUEST FOR INJUNCTIVE RELIEF - 5

Robert L. Harris, Esq. (ISB #7018)
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Facsimile: (208) 523-9518

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08 JUL 23 PM 2:22

FRANKLIN COUNTY CLERK

K. Kinsie
DEPUTY

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

TWIN LAKES CANAL COMPANY, an
Idaho Corporation,

Plaintiff,

vs.

WARREN CHOULES, an individual, and
SESSILEE J. CHOULES, as Trustee of the
Choules Family Trust,

Defendants.

Case No. CV-2008-275

SUMMONS

NOTICE:

**YOU HAVE BEEN SUED BY THE ABOVE NAMED PLAINTIFF. THE
COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT
FURTHER NOTICE UNLESS YOU RESPOND WITHIN TWENTY (20)
DAYS. READ THE INFORMATION BELOW.**

TO: DEFENDANT WARREN CHOULES

172 W. 1st S. Clifton ID 83228

You are hereby notified that in order to defend this lawsuit, an appropriate written

response must be filed with the above designated court within twenty (20) days after service of

this Summons on you. If you fail to respond, the court may enter judgment against you as

demanded by Plaintiff in the Complaint.

A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the clerk of the above named court.

CLERK OF THE DISTRICT COURT

By: _____

Deputy



Dated: _____

7-23-08

G:\WPDATA\RLH\7168-000 Twin Lakes\Choules Complaint 7-16-08 Twin Lakes WC.wpd

Robert L. Harris, Esq. (ISB #7018)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
Idaho Falls, Idaho 83402
P.O. Box 50130
Idaho Falls, Idaho 83405-0130
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

FILED

08 JUL 23 PM 2:22

FRANKLIN COUNTY CLERK

K. B. Bussin
DEPUTY

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

TWIN LAKES CANAL COMPANY, an
Idaho Corporation,

Plaintiff,

vs.

WARREN CHOULES, an individual, and
SESSILEE J. CHOULES, as Trustee of the
Choules Family Trust,

Defendants.

Case No. CV-2008-275

SUMMONS

NOTICE:

**YOU HAVE BEEN SUED BY THE ABOVE NAMED PLAINTIFF. THE
COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT
FURTHER NOTICE UNLESS YOU RESPOND WITHIN TWENTY (20)
DAYS. READ THE INFORMATION BELOW.**

TO: DEFENDANT SESSILEE J. CHOULES

172 W. 1st S. Clifton ID. 83226

You are hereby notified that in order to defend this lawsuit, an appropriate written

response must be filed with the above designated court within twenty (20) days after service of

this Summons on you. If you fail to respond, the court may enter judgment against you as

demanded by Plaintiff in the Complaint.

A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the clerk of the above named court.

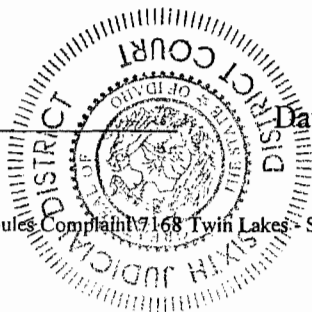
CLERK OF THE DISTRICT COURT

By: 

Deputy

Dated: 7-23-08

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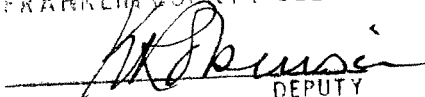


Robert L. Harris, Esq. (ISB #7018)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
Idaho Falls, Idaho 83402
P.O. Box 50130
Idaho Falls, Idaho 83405-0130
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

FILED

08 JUL 23 PM 2:22

FRANKLIN COUNTY CLERK


DEPUTY

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

TWIN LAKES CANAL COMPANY, an
Idaho Corporation,

Plaintiff,

vs.

WARREN CHOULES, an individual, and
SESSILEE J. CHOULES, as Trustee of the
Choules Family Trust,

Defendants.

Case No. CV-2008-275

**MOTION FOR PRELIMINARY
INJUNCTION AND FOR EXPEDITED
NOTICE OF HEARING**

COMES NOW Plaintiff, through the undersigned counsel, and moves this Court for an expedited hearing for the purpose of issuing a preliminary injunction in the above referenced matter. The reasons for this motion are as follows:

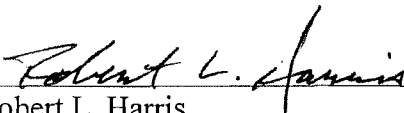
1. Plaintiff is the owner of a prescriptive easement to fill Twin Lakes Reservoir, located in Franklin County, Idaho, to gauge height 75.2.
2. Full enjoyment of this easement is necessary for Plaintiff to meet the water needs of its shareholders.

3. Defendants have unreasonably interfered with, and are continuing to unreasonably interfere with, Plaintiff's full enjoyment of its easement. The nature of Defendants' interference with Plaintiff's easement, and a description of Plaintiff's damages, is more fully set forth in Plaintiff's Complaint and Request for Injunctive Relief.

4. A preliminary injunction is appropriate in this case for the reasons set forth in Rule 65(e), I.C.R.P.

5. An expedited hearing on the preliminary injunction is necessary to abate the continuing irreparable harm caused by Defendants' interference with Plaintiff's easement. Plaintiff requests that, pursuant to Rule 7(b)(3), I.R.C.P., this Court order a hearing on the matter as soon as is practicable for the Court and counsel.

Dated this 22nd day of July, 2008.



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

Robert L. Harris, Esq. (ISB #7018)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
Idaho Falls, Idaho 83402
P.O. Box 50130
Idaho Falls, Idaho 83405-0130
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

FILED
08 JUL 23 PM 2:22
FRANKLIN COUNTY CLERK
R. Bunsen
DEPUTY

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

TWIN LAKES CANAL COMPANY, an
Idaho Corporation,

Plaintiff,

vs.

WARREN CHOULES, an individual, and
SESSILEE J. CHOULES, as Trustee of the
Choules Family Trust,

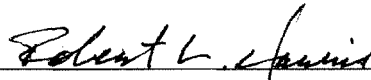
Defendants.

Case No. CV-2008-275

**NOTICE OF HEARING ON MOTION
FOR PRELIMINARY INJUNCTION
AND TO SHORTEN TIME FOR NOTICE
OF HEARING**

Twin Lakes Canal Company ("Twin Lakes"), by and through its attorney of record,
Robert L. Harris, Esq., of HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C., hereby provides notice
that Twin Lakes' Motion for Preliminary Injunction and To Shorten time for Notice of Hearing
will be heard on Thursday, August 14th, 2008, at 2:30 P.M., or as soon thereafter as counsel may
be heard, in the Courtroom of the Franklin County Courthouse, 39 West Oneida Street, Preston,
Idaho 83263.

DATED this 22nd day of July, 2008



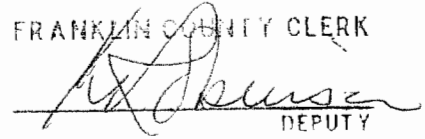
Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

G:\WPDATA\RLH\7168-000 Twin Lakes\Choules Complaint\Notice of Hearing.wpd

FILED

08 AUG 11 PM 3:20

FRANKLIN COUNTY CLERK


DEPUTY

Blake S. Atkin (ISB# 6903)
7579 North Westside Highway
Clifton, Idaho 83228
Telephone: (208) 747-3414

ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Bountiful, Utah 84010
Telephone: (801) 533-0300
Fax: (801) 533-0380

Attorneys for Defendants

**IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
FRANKLIN COUNTY, STATE OF IDAHO**

TWIN LAKES CANAL COMPANY, an
Idaho Corporation,

Plaintiff,

v.

WARREN CHOULES, an individual, and
SESSILEE J. CHOULES, as Trustee of the
Choules Family trust,

Defendants.

**MOTION TO DISMISS FOR FAILURE
TO STATE A CLAIM UPON WHICH A
CLAIM FOR RELIEF CAN BE
GRANTED**

Case No. cv-08-275

Defendants respectfully move this Court to dismiss Plaintiff's complaint on the ground that it fails to state a claim on which relief may be granted. Defendants request oral argument on this motion and shall submit a memorandum in support hereof within 14 days pursuant to Rule 7 of the Idaho Rules of Civil Procedure.

DATED this 11 day of August, 2008.

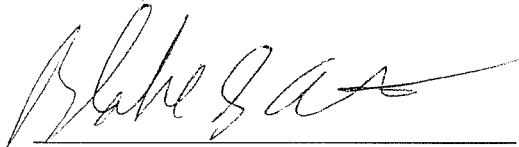


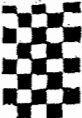
Blake S. Atkin
Attorney for Defendants

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED** was mailed first class, postage prepaid this 11 day of August, 2008 to the following:

Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO,
PLLC
1000 Riverwalk Drive, Suite 200
Idaho Falls, Idaho 83402
P.O. Box 50130
Idaho Falls, Idaho 83405-0130
Phone: (208) 523-0620
Facsimile: (208) 523-9518





AUG. 18. 2008 10:21AM

JUDGE HARDING

FAX No. 208 852 2006

NO. 897

P. 1/002

FILED

08 AUG 18 AM 10:20

FRANKLIN COUNTY CLERK

K. Jones

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

TWIN LAKES CANAL COMPANY,
an Idaho Corporation,

Plaintiff(s),

vs

WARREN CHOULES, an individual and
SESSILEE J. CHOULES, as Trustee of
the Choules Family Trust,

Defendant(s).

Case No. CV-2008-275

MINUTE ENTRY AND ORDER

DATE: August 14, 2008

APPEARANCES: Robert L. Harris, Attorney for Plaintiff
Blake S. Atkin, Attorney for Defendants

MATTERS BEFORE THE COURT: Motion for Preliminary Injunction/Motion to Dismiss

PROCEEDINGS: This matter came for hearing regarding the above-stated Motions. Mr.

Harris called the following witness:

Jim Naylor

The following exhibits were submitted as follows:

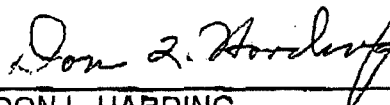
- A. Findings of Fact; and an Order Granting a Permanent Injunction Preventing the Defendant From Raising the Water in the Twin Lakes Reservoir Above Gauge Height 75.2 – ADMITTED by stipulation
- B. Judgment – ADMITTED by stipulation
- C. Order and Judgment for a Directed Verdict on the Issue of Damages – ADMITTED by stipulation.

- F. Map – ADMITTED for illustrative purposes
- G. Map – ADMITTED for illustrative purposes
- O. Photographs 1-29 ADMITTED, 30-34 ADMITTED property above the water line
- P. Photographs 1-8 ADMITTED, 9 and 10 NOT ADMITTED, 11-13 ADMITTED, 14, 15 NOT ADMITTED, 19-22 ADMITTED

Due to time constraints the Court requested that this matter be set for another date and set it to begin **Thursday, September 4, 2008 at 9:00 a.m.**

The Court ordered a Temporary Restraining Order that no further equipment work be done on the property by defendants or their agents, employees or representatives until further order of the Court, and Twin Lakes Canal Company shall post a bond of \$5,000. Mr. Harris requested that he be allowed to file an Amended Complaint.

DATED this 18th day of August, 2008.



DON L. HARDING
District Judge

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on the 18th day of August, 2008, I mailed/served/faxed a true copy of the foregoing document on the attorney(s)/person(s) listed below by mail with correct postage thereon or causing the same to be hand delivered.

Attorney(s)/Person(s):

Robert L. Harris
Attorney for Plaintiff

Blake S. Atkin
Attorney for Defendants

Method of Service:

Faxed: 523-9518

Faxed: 1-801-533-0380

V. ELLIOTT LARSEN, Clerk

BY: 
Linda Hampton, Deputy

Robert L. Harris, Esq. (ISB #7018)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
Idaho Falls, Idaho 83402
P.O. Box 50130
Idaho Falls, Idaho 83405-0130
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

FILED

08 AUG 26 AM 9:45

FRANKLIN COUNTY CLERK
L. Hampton
DEPUTY

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

TWIN LAKES CANAL COMPANY, an
Idaho Corporation,

Plaintiff,

vs.

WARREN CHOULES, an individual, and
SESSILEE J. CHOULES, as Trustee of the
Choules Family Trust,

Defendants.

Case No. CV-2008-275

**AMENDED VERIFIED COMPLAINT
FOR CONDEMNATION AND REQUEST
FOR PRELIMINARY INJUNCTIVE
RELIEF**

Twin Lakes Canal Company ("Twin Lakes"), by and through its attorney of record, Robert L. Harris, Esq., of HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C., complains and alleges against the defendants, and each of them, for cause of action as follows:

STATEMENT OF JURISDICTION

1. Twin Lakes is an Idaho Corporation which provides irrigation water to its shareholders.

Twin Lakes owns and operates the Twin Lakes Canal and Twin Lakes Reservoir, both of which are located in Franklin County, Idaho. Twin Lakes delivers water for irrigation

purposes to a service area of approximately 25,000 acres primarily located on the west side of Franklin County.

2. Defendant Warren Choules resides in Franklin County, Idaho. Defendant Sessilee J. Choules, Trustee of the Choules Family Trust, also resides in Franklin County, Idaho.
3. Defendants are the owners of real property located in Franklin County, Idaho, which is adjacent to and covered by the Twin Lakes Reservoir, and is more fully described in Exhibit A attached hereto and is hereinafter referred to as the "Subject Property."
4. Venue is proper pursuant to I.C. §§ 5-401 and 5-404.
5. Jurisdiction is proper pursuant to I.C. §§ 1-705 and 7-706.

GENERAL ALLEGATIONS

6. Twin Lakes realleges the allegations of paragraphs 1 through 5 of this Complaint as though the same were here set in full.
7. Defendants are shareholders in Twin Lakes.
8. A portion of the Subject Property is covered by water stored in Twin Lakes Reservoir.
9. The remaining portion of the Subject Property is adjacent to Twin Lakes Reservoir, which has a portion of the Twin Lakes Canal located upon it.
10. In 2004, Defendants sued Twin Lakes for various causes of action, two of which related to Twin Lakes' storage of water on the Subject Property and for damages relating to Twin Lakes' removal of an unauthorized fence in the Twin Lakes Canal.

11. In 2006, Twin Lakes was awarded a Judgment in Franklin County Case No. CV-04-241 declaring that Twin Lakes owns an “easement to fill the Twin Lakes Reservoir to a gauge height 75.2” on the Subject Property.
12. In addition, the court in Franklin County Case No. CV-04-21 decreed that activities undertaken by Defendants in installing fences in the Twin Lakes Canal and grazing cattle on the Subject Property unreasonably interfered with the Twin Lakes Canal. The court held that “[Twin Lakes] has a prescriptive easement to establish and use the canal across the [Choules] property” and “[a]ny conduct on the part of the Plaintiff that prohibits or interferes with that right would be impermissible.” *Memorandum Decision and Order Denying in Part and Granting in Part the Motion to Alter or to Amend, and Vacating the Judgment and to Postpone Decision on Costs and Attorney Fees* at 2 (entered on August 30, 2005).
13. Both the Twin Lakes Reservoir and Twin Lakes Canal are necessary for Twin Lakes’ organized purposes of delivering irrigation water to its shareholders.
14. At some point prior to November 2007, Defendants began using heavy equipment to move earth, rocks, concrete, and other debris from elsewhere on the Subject Property to areas below gauge height 75.2 in Twin Lakes Reservoir.
15. By moving earth, rocks, concrete, or other debris to areas below gauge height 75.2 on Twin Lakes Reservoir, Defendants reduced the volume of space that Twin Lakes can use to store water for its shareholders.
16. In addition, use of heavy equipment below gauge height 75.2 on Twin Lakes Reservoir has damaged a clay lining which Twin Lakes previously installed to plug a leak in the Twin Lakes Reservoir.

17. The intact clay lining reduces the amount of water that leaks through the soil of Twin Lakes Reservoir. When the lining is disturbed, additional water is lost to leakage.
18. The filling in of Twin Lakes Reservoir and damage to the clay lining, which causes the Twin Lakes Reservoir to leak, would be extremely detrimental to Twin Lakes' shareholders as it would reduce the amount of storage water available for delivery to Twin Lakes shareholders.
19. The failure to deliver storage water, or the reduction in amount of storage water available for delivery to Twin Lakes shareholders, would be devastating to Twin Lakes' shareholders, the west side of Franklin County, and to the local economy.
20. In addition, Defendants performed work on the Subject Property above the level of Twin Lakes Reservoir, but directly below the Twin Lakes Canal.
21. The Twin Lakes Canal is located on a very sensitive area of the Subject Property, as it traverses a steep gradient, and requires support below it to exist.
22. The removal of support material below the canal substantially increases the risk of a canal washout.
23. Water flowing in the Twin Lakes Canal on the Subject Property is water diverted pursuant to Twin Lakes' natural flow water rights out of Mink Creek, which enters Twin Lakes' delivery system, and eventually is delivered into an inverted siphon located just beyond the boundary of the Subject Property and into Twin Lakes' water distribution system.
24. A washout of the Twin Lakes Canal would be extremely detrimental to Twin Lakes' shareholders as it would prevent delivery of water diverted pursuant to Twin Lakes' natural flow water rights.

25. The failure to deliver water diverted pursuant to Twin Lakes' natural flow water rights would be devastating to Twin Lakes' shareholders, the west side of Franklin County, and to the local economy.
26. Twin Lakes depends on the full use of the water in Twin Lakes Reservoir and Twin Lakes Canal to satisfy the water needs of its shareholders.
27. Twin Lakes has advised Defendants that their conduct infringes upon Twin Lakes' easement rights.
28. Despite requests from Twin Lakes for Defendants to cease earth moving work on the Subject Property, Defendants have continued to perform such work, thereby causing additional damage to the Twin Lakes Reservoir and Twin Lakes Canal.
29. Defendants' activities violate Idaho law as they unreasonably interfere with Twin Lakes established easements.
30. Defendants have repeatedly ignored Twin Lakes' reasonable requests to cease such work.
31. Even if Defendants' activities are deemed legal, such activities pose a serious threat to Twin Lakes' ability to provide water to its shareholders, and Twin Lakes is left with no choice but to proceed with a condemnation action for the entire Choules property in order to continue its service of providing irrigation water to its shareholders from its reservoirs, canals, and ditches.

COUNT ONE: CONDEMNATION

32. Twin Lakes realleges the allegations of paragraphs 1 through 31 of the Complaint as though the same were here set in full.

33. As an Idaho Corporation organized under the laws of Idaho with its purpose to provide irrigation water to its shareholders, Twin Lakes is authorized to exercise the power of eminent domain pursuant to Idaho Code §§ 7-701 to 7-721, which specifically authorizes condemnation of private land for “reservoirs, canals, and ditches.” Idaho Code § 7-701(3).
34. Such authority contained in Idaho Code §§ 7-701 to 7-721 “govern[s] the exercise of what is commonly called a private eminent domain power.” *Erickson v. Amoth*, 112 Idaho 1122, 1124, 739 P.2d 421, 423 (Idaho App. 1987).
35. The Idaho Supreme Court has recognized that “[t]he irrigation and reclamation of arid lands is a well recognized public use, Idaho Const. Art. 1, Section 14, and Art. 15, Section 1: Idaho Code § 7-701(3), even if the irrigation project is ostensibly intended to benefit only private individuals. Article 1, Section 14, of the Idaho Constitution confers the right to condemn for individual use on the theory that development of individual property tends to complete the development of the entire state.” *Canyon View Irrigation Co. v. Twin Falls Canal Co.* 101 Idaho 604, 607, 619 P.2d 122, 125 (1980).
36. Because the activities undertaken by Defendants on the Subject Property that threaten the integrity of the Twin Lakes Reservoir and Canal, and because of Defendants propensity to ignore Twin Lakes’ reasonable requests to cease such work, the taking of the Subject Property is necessary for Twin Lakes’ purposes of protecting and continuing the operation of its “reservoirs, canals, and ditches” (Idaho Code § 7-701(3)), a recognized public purpose under Idaho law.

37. It is necessary for Twin Lakes to obtain the entirety of the Subject Property to accomplish its purposes of providing irrigation water to its shareholders who constitute members of the public in Franklin County.
38. The property sought by Twin Lakes—the Subject Property—is real property, and is subject to taking pursuant to Idaho Code § 7-701(1).
39. Condemnation of the property sought to be taken would be the most compatible with the greatest public good, and cause the least private injury pursuant to Idaho Code § 7-705.
40. Twin Lakes has offered to purchase the Subject Property, but has been flatly rejected by Defendants. Twin Lakes has therefore undertaken good faith negotiations to acquire and purchase the land sought to be taken and been unable to make any reasonable bargain therefore.
41. Twin Lakes is entitled to a final order of condemnation, declaring and determining the value of the Subject Property, and determining that Twin Lakes is entitled to take the Subject Property subject to payment by Twin Lakes to Defendants of just compensation for the Subject Property, all as may be determined at the trial of this action.

COUNT TWO: PRELIMINARY INJUNCTION

42. Twin Lakes realleges the allegations of paragraphs 1 through 41 of this Complaint as though the same were here set in full.
43. As described above, Defendants have performed unauthorized work on the Subject Property which has interfered with Twin Lakes' easements and caused irreparable injury.
44. Defendants have continued such work despite reasonable requests from Twin Lakes to cease such work.

45. If Defendants are not stopped for performing earthmoving work that interferes with Twin Lakes' easements during the pendency of the condemnation action, Defendants will continue to cause and increasingly cause irreparable increase harm to Twin Lakes.
46. Twin Lakes is entitled to a preliminary injunction against Defendants preventing them from using heavy equipment to move earth, rocks, concrete, or other debris on the Subject Property during the pendency of the condemnation action.

COUNT THREE: DAMAGES

47. Twin Lakes realleges the allegations of paragraphs 1 through 46 of the Complaint as though the same were here set in full.
48. As a result of the actions taken by Defendants, Twin Lakes Reservoir and Canal has been damaged in an amount to be proven at trial.

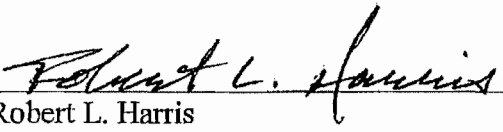
RELIEF REQUESTED

WHEREFORE, Twin Lakes prays for the Judgment, Order and Decree of this Court against Defendants as follows:

1. For a final order of condemnation, declaring and determining the value of the Subject Property, and determining that Twin Lakes is entitled to take the Subject Property subject to payment by Twin Lakes to Defendants of just compensation for the Subject Property, all as may be determined at the trial of this action;
2. For an immediate hearing to consider the issuance of a preliminary injunction against Defendants preventing them from using heavy equipment to move earth, rocks, concrete, or other debris on the Subject Property during the pendency of the condemnation action;

3. For damages caused to the Twin Lakes Reservoir and Twin Lakes Canal in an amount to be proven at trial;
4. For attorney fees and costs incurred by Twin Lakes in bringing this action pursuant to Idaho Code § 7-718 and I.R.C.P. 54(d)(1).
5. For such other and further relief as the Court deems just and appropriate.

Dated this 26th day of August, 2008.


Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

STATE OF IDAHO)
)ss.
County of Franklin)

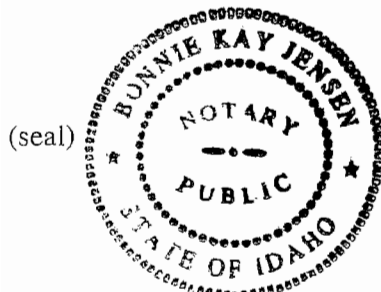
CLAIR BOSEN, President of Twin Lakes Canal Company, being first duly sworn, deposes and says: That he is the Plaintiff in the above-entitled action; that she has read the above and foregoing AMENDED VERIFIED COMPLAINT FOR CONDEMNATION AND REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF , knows the contents thereof and that she believes the facts therein stated to be true.

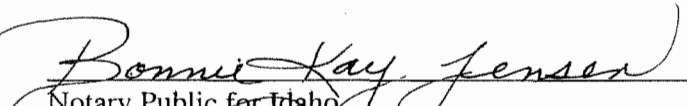
TWIN LAKES CANAL COMPANY



By: Clair Bosen.
Its: President

SUBSCRIBED and sworn to before me this 26 day of August, 2008.




Notary Public for Idaho
Residing at: Preston, Idaho
Commission Expires: 7-7-2012

G:\WPDATA\IRLH\7168-000 Twin Lakes\Choules Complaint\7168 Twin Lakes - Amended Complaint.wpd

EXHIBIT A

The Subject Property

Commencing at the Northeast Corner of the Northwest Quarter of the Northwest Quarter of Section 25, Township 14 South, Range 38 East Boise Meridian. Running thence South 117 rods more or less to an established fence line, thence following said fence line in a Northwesterly direction to a point on the North line of said Section 25 - 63 rods more or less West of the point of beginning, thence East 63 rods to the point of beginning, all located in Franklin County.

G:\WPDATA\RLH\7168-000 Twin Lakes\Choulos Complaint\7168 Twin Lakes - Amended Complaint.Final.wpd

CERTIFICATE OF SERVICE

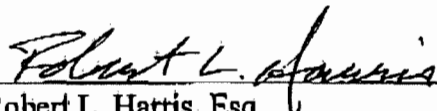
I hereby certify that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, on this 26th day of August, 2008.

DOCUMENT SERVED: **AMENDED VERIFIED COMPLAINT FOR CONDEMNATION AND REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF**

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Blake S. Atkin
Atkin Law Offices, PC
837 S. 500 W., Ste. 200
Bountiful, UT 84010
Fax No.: 801-533-0380

(☒) *First Class Mail*
(☐) *Hand Delivery*
(☒) *Facsimile*
(☐) *Overnight Mail*
(☐) *Email*


Robert L. Harris, Esq.
Holden, Kidwell, Hahn & Crapo, PLLC

FILED

08 AUG 28 PM 3:18

FRANKLIN COUNTY CLERK

Klones
DEPUTY

Blake S. Atkin (ISB# 6903)
7579 North Westside Highway
Clifton, Idaho 83228
Telephone: (208) 747-3414

ATKIN LAW OFFICES, P.C.
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Attorney for Defendants

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
FRANKLIN COUNTY, STATE OF IDAHO

TWIN LAKES CANAL COMPANY,
an Idaho Corporation,

Plaintiff,

v.

WARREN CHOULES, an individual, and
SESSILLEE J. CHOULES, as Trustee of the
Choules Family Trust.

Defendants.

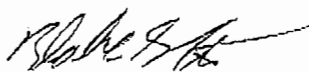
**MOTION TO CONTINUE
HEARING ON
PRELIMINARY INJUNCTION**

Case No. CV-08-275

Defendants respectfully move the court to continue the hearing on Plaintiff's Motion for Preliminary Injunction currently scheduled on September 4, 2008 at 9:00 AM. The grounds for this motion are that two of Defendants key witnesses will not be available on that date. Defendants have attempted several times to contact opposing counsel who has not returned Defendants calls and thus Defendants have been unable to discuss the matter with opposing counsel.

Dated this 28th day of August, 2008.

ATKIN LAW OFFICES, P.C



Blake S. Atkin
Attorney for Defendants

CERTIFICATE OF SERVICE

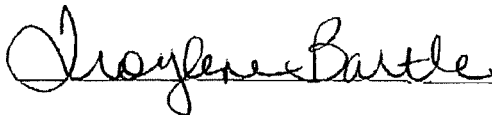
I HEREBY CERTIFY that on this 28th day of August, 2008, I served a true and correct copy of the foregoing **MOTION TO CONTINUE HEARING ON PRELIMINARY INJUNCTION** upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

6th Judicial District Court of Idaho
Franklin County Courthouse
Clerk of the Court
39 West Oneida
Preston, ID 83276
Telephone 208-852-1090
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08 SEP -4 AM 10: 05
FRANKLIN COUNTY CLERK
Hampton
DEPUTY

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

TWIN LAKES CANAL COMPANY, an
Idaho Corporation,

Plaintiff,

vs.

WARREN CHOULES, an individual, and
SESSILEE J. CHOULES, as Trustee of the
Choules Family Trust,

Defendants.

Case No. CV-2008-275

**TWIN LAKES CANAL COMPANY'S
BRIEF REGARDING
IDAHO CODE § 5-246**

Twin Lakes Canal Company ("Twin Lakes"), by and through its attorney of record, Robert L. Harris, Esq., of HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C., hereby submits this brief regarding the provisions of Idaho Code § 5-246. This brief was requested by the court at the preliminary injunction hearing held on this matter on August 14, 2008.

I. INTRODUCTION AND PROCEDURAL HISTORY¹

Twin Lakes is an Idaho Corporation which provides irrigation water to its shareholders. Twin Lakes owns and operates the Twin Lakes Canal and Twin Lakes Reservoir, both of which are located in Franklin County, Idaho. Twin Lakes delivers water for irrigation purposes to a service area of approximately 25,000 acres primarily located on the west side of Franklin County.

The Choules Family Trust (“Choules”) owns property which is partially covered by Twin Lakes Reservoir (the “Choules Property”). In 2004, Choules sued Twin Lakes for various causes of action, two of which related to Twin Lakes’ storage of water on the Choules Property and for damages relating to Twin Lakes’ removal of an unauthorized fence in the Twin Lakes Canal. In 2006, Twin Lakes was awarded a Judgment in Franklin County Case No. CV-04-241 declaring that Twin Lakes owns an “easement to fill the Twin Lakes Reservoir to a gauge height 75.2” on the Choules Property.

At some point prior to November 2007, Defendants began using heavy equipment to move earth, rocks, concrete, and other debris from elsewhere on the Choules Property to areas below gauge height 75.2 in Twin Lakes Reservoir. Twin Lakes is concerned that by moving earth, rocks, concrete, or other debris to areas below gauge height 75.2 on Twin Lakes Reservoir, because the Defendants reduced the volume of space that Twin Lakes can use to store water for its shareholders. Twin Lakes is also concerned that use of heavy equipment below gauge height 75.2 on Twin Lakes Reservoir damaged a clay lining which Twin Lakes previously installed to plug a leak in the Twin Lakes Reservoir.

¹ The statements in this section are primarily supported by the allegations contained in the Amended Verified Complaint.

In addition, Defendants performed work on the Choules Property above the level of Twin Lakes Reservoir, but directly below the Twin Lakes Canal. The Twin Lakes Canal is located on a very sensitive area of the Choules Property, as it traverses a steep gradient, and requires support below it to exist. Twin Lakes is concerned that removal of support material below the canal substantially increases the risk of a canal washout, which would be devastating to Twin Lakes' shareholders.

Despite requests from Twin Lakes for Defendants to cease earth moving work on the Choules Property, Defendants have continued to perform such work, thereby causing additional damage to the Twin Lakes Reservoir and Twin Lakes Canal. Twin Lakes was left with no choice but to file a Complaint against the Defendants, which was superseded by an Amended Complaint filed on August 26, 2008. The Amend Complaint seeks condemnation of the Choules Property, a preliminary injunction prohibiting Defendants from using heavy equipment on the Choules Property, and for damages caused by the Defendants' activities.

At a hearing for preliminary injunction held on August 14, 2008, Defendants argued that no such injunction should be granted as they believe they have a right to fill in Twin Lakes Reservoir and use heavy equipment which damages the clay liner pursuant to Idaho Code § 5-246. This statute, in its entirety, is as follows:

5-246. PRESCRIPTIVE OVERFLOW EASEMENTS. In conformity with the limitations of actions time period set forth in sections 5-203 through 5-206, Idaho Code, the owner of a dam shall be deemed to have obtained a nonexclusive prescriptive overflow easement over real property which has been inundated or overflowed by the operations of the dam for at least a part of a year for any consecutive five (5) year period prior to commencement of an action by the property owner seeking relief inconsistent with such nonexclusive prescriptive overflow easement. Said dam owner shall be deemed to have not forfeited said nonexclusive prescriptive overflow easement if the reason for the failure to exercise the easement is a lack of water caused by drought or acts of God. It is further provided that if a

dam has inundated or overflowed real property for at least a part of a year for the five (5) consecutive years prior to the enactment of this section, then the owner of the dam shall be deemed to have obtained a nonexclusive prescriptive overflow easement hereunder over said real property one (1) year after the enactment of this section, provided, no action seeking relief inconsistent with such nonexclusive prescriptive overflow easement has been commenced by the property owner within one (1) year of the enactment of this section. The provisions of this section shall not be construed to affect the riparian and littoral rights of property owners to have access to and use of waters in this state, or to restrict any use of the underlying property for any purpose otherwise consistent with ownership thereof, even if said use interferes with the storage of water on the property. Nothing herein shall be deemed to affect any prescriptive overflow easement that any dam owner may have previously acquired under common law. The provisions of this section shall not be construed to apply to the beds of navigable waters lying below the natural or ordinary high watermark as defined in subsection (c) of section 58-1302, Idaho Code, and subsection (9) of section 58-104, Idaho Code, or any other lands owned by the state of Idaho.

The specific language from the above statute relied upon by Defendants is the portion which states that “[t]he provisions of this section shall not be construed to affect the riparian and littoral rights of property owners to have access to and use of water in this state, or to restrict any use of the underlying property for any purpose inconsistent with ownership thereof, **even if said use interferes with the storage of water on the property.**”²

For the reasons set forth below, Idaho Code § 5-246 does not grant Defendants with the unquestioned right to fill in Twin Lakes Reservoir, or to continually undertake activities with heavy equipment which damages the clay liner in the reservoir, or to perform any act which materially interferes with Twin Lakes’ right to store water in Twin Lakes Reservoir.

II. ARGUMENT.

Twin Lakes possesses a prescriptive overflow easement pursuant to Idaho Code § 5-246. As the holder of an easement, Twin Lakes is the dominant estate and Choules is the servient estate. Defendants nevertheless argue that they have the right to undertake activities that destroy the very

² Emphasis added.

purpose of the overflow easement—the right to detain or backup water onto another’s property. Without space on the Choules Property to store water, there is effectively no easement to store water on the Choules Property. Without a clay liner in the Twin Lakes Reservoir to hold the stored water, there is no protected ability for Twin Lakes to hold such water. Thus, at its core, Defendants argument with regards to the interpretation of Idaho Code § 5-246 is that Twin Lakes does not have an easement and that there is no dominant and servient estate. This is, of course, is directly contrary to this court’s previous entry of judgment with regards to the easement Twin Lakes possesses.

There is no Idaho case which directly addresses which activities may be undertaken by a servient estate pursuant to the portion of Idaho Code § 5-246 relied upon by Defendants—those actions which may “interfere” with the storage of water on the property. Nevertheless, as to the correlative rights of dominant and servient estates, the law is well settled:

The law is well settled with respect to the correlative rights of dominant and servient owners of easements. The owner of the servient estate is entitled to use the estate in any manner not inconsistent with, or which does not materially interfere with, the use of the easement by the owner of the dominant estate. In other words, the servient estate owner is entitled to make uses of the property that do not unreasonably interfere with the dominant estate owner's enjoyment of the easement. Thus, an easement owner is entitled to relief upon a showing that he is obstructed from exercising privileges granted in the easement.³

Based on Defendants’ argument, they assert that they have a right to fill in Twin Lakes Reservoir and damage its clay lining as these actions only “interfere” with Twin Lakes’ easement to store water. The actions of Defendants do not merely interfere, they **materially** interfere with Twin Lakes’ easement. Indeed, these actions effectively destroy the purpose of the easement. Thus, Defendants interpretation of the above statute appears to be in conflict with well-settled Idaho law.

³ Nampa & Meridian Irr. Dist. v. Washington Federal Sav. 135 Idaho 518, 522, 20 P.3d 702, 706 (Idaho,2001)

An Idaho court “interprets statutes according to the plain, express meaning of the provision in question, and will resort to judicial construction only if the provision is ambiguous, incomplete, absurd, or arguably in conflict with other laws. . . . Constructions of a statute that would lead to absurd or unreasonably harsh results are disfavored.”⁴ Because Defendants’ interpretation of the Idaho Code § 5-246 appears to be in conflict with well-settled Idaho law, and would result in an absurd result, it is appropriate for this court to engage in statutory interpretation.

Twin Lakes is a man-made reservoir, and not a natural lake. As such, Defendants or other adjacent landowners do not possess riparian or littoral rights under Idaho law⁵, which defines such rights as follows:

"Riparian or littoral rights" means only the rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and to make use of their rights as riparian or littoral owners or lessees in building or using aids to navigation but does not include any right to make any consumptive use of the waters of the lake.⁶

As used in the above definition, “navigable lake” does not include man-made reservoirs.⁷

It is arguable that the portion of Idaho Code § 5-246 relied upon by Defendants only applies in the context where a landowner does have riparian or littoral rights, as the first clause of the

⁴ State v. Yager 139 Idaho 680, 689-90, 85 P.3d 656, 665-66 (Idaho, 2004).

⁵ Riparian and littoral rights are closely related, and perhaps indistinguishable as they relate to rights arising from location next to water. The distinction, therefore, is in the type of water: “The rights of an adjacent landowner in nontidal waters, such as the waters of a river or stream, are known as “riparian” rights, whereas the rights of such an owners in sea waters or the water of a lake are called “littoral” rights.” 65 C.J.S. Navigable Waters § 82.

⁶ Idaho Code § 58-1302(f).

⁷ Id. § 58-1302(a). The complete definition of “navigable lake” is as follows: “Navigable lake” means any permanent body of relatively still or slack water, including man-made reservoirs, not privately owned and not a mere marsh or stream eddy, and capable of accommodating boats or canoes. This definition does not include man-made reservoirs where the jurisdiction thereof is asserted and exclusively assumed by a federal agency.

sentence specifically states that the statute “shall not be construed to affect the riparian and littoral rights of property owners . . .” Thereafter, the statute reads “or to restrict any use of the underlying property for any purpose consistent with ownership thereof, even is said use interferes with the storage of water on the property.” In reading the statute in context with its reference to riparian or littoral rights, it could be interpreted such that this portion of the statute is inapplicable in this case.

But perhaps the better argument is to look to riparian and littoral rights for guidance as to which activities are permitted for holders of such rights. Generally, the common law rights for riparian and littoral rights holders include the right of access to the water, the right to build a pier in aid of navigation, the right to use of the shoreline, a limited right to intrude onto a lake or river bed to construct devices for protection from erosion, etc.⁸ While these activities may interfere with storage of water in a reservoir, they do not materially interfere, and are generally considered reasonable. Thus, such uses appear consistent with fundamental Idaho law regarding dominant and servient estates as they are reasonable.

Without a doubt, filling in Twin Lakes Reservoir and damaging its clay lining is unreasonable. Further, it is inconsistent with very purpose of the Twin Lakes Reservoir from which Defendants benefit—to store water. Because the easement has been defined by this court, Twin Lakes cannot change the use of the easement that changes the character of the servitude that increases the burden on the servient tenement.⁹ In this case, Twin Lakes has not made any changes. The easement has always been used to place water in Twin Lakes Reservoir. What has changed is the use of the

⁸ 78 Am. Jur. 2d Waters § 35; 65 C.J.S. Navigable Waters § 82.

⁹ See *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 549 (1991). For example, Twin Lakes could not construct a boat dock on the Choules Property as the easement it has obtained does not provide for such use.

servient estate. It is now, apparently, being used as a fill site when it was not used as one previously. Such use is inconsistent with Twin Lakes' easement.

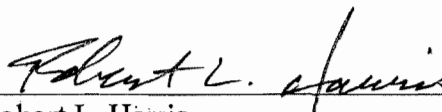
In short, the existence of an easement means there is a dominant and servient estate. Under Defendants' interpretation of Idaho Code § 5-246, no such classifications exist. This interpretation of Idaho law ignores well-settled Idaho law with regards to easements and the correlative rights of those involved. As an interpretation that would lead to a conflict in Idaho law, this court should construe Idaho Code § 5-246 in a manner set forth by Twin Lakes as described above, which would not lead to a conflict in Idaho law. Further, in construing this statute, the court is obligated to do so in a manner that would not lead to an "absurd" result. We cannot think of a more absurd result than one that effectively cancels Twin Lakes' easement and condones the filling in of a reservoir used to store water for the benefit of a large segment of the Franklin County population. This is the interpretation proposed by Defendants, and surely, it must be rejected.

Lastly, we note that under Defendants' interpretation of Idaho Code § 5-246, the Choules Property could also be used as a landfill, garbage dump, chemical waste dump, or any other use conceived by Defendants. In addition to the easement discussion set forth above, Defendants' interpretation of this statute also fails because it would be against public policy. Generally speaking, the filling of a river or reservoir is closely regulated by numerous state and federal agencies. Under Defendants' proposed statutory interpretation, any use of the Choules Property, whether reasonable or not, would be permitted. This is obviously at odds with other federal and state law, which are statements of public policy. Because Defendants' interpretation is at odds with that public policy, it must be rejected.

III. CONCLUSION.

For the reasons set forth above, Idaho Code § 5-246 must be interpreted in the manner set forth by Twin Lakes. Further, because the activities undertaken by Defendants materially interfere with Twin Lakes' easement, this court should grant Plaintiff's request for a preliminary injunction.

Dated this 4th day of September, 2008.



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

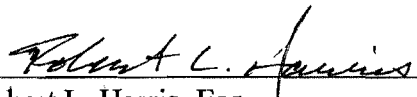
I hereby certify that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, on this 4th day of September, 2008.

DOCUMENT SERVED: **TWIN LAKES CANAL COMPANY'S BRIEF REGARDING
IDAHO CODE § 5-246**

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Blake S. Atkin
Atkin Law Offices, PC
837 S. 500 W., Ste. 200
Bountiful, UT 84010
Fax No.: 801-533-0380

() *First Class Mail*
(☒) *Hand Delivery*
() *Facsimile*
() *Overnight Mail*
() *Email*


Robert L. Harris, Esq.
Holden, Kidwell, Hahn & Crapo, PLLC

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FRANKLIN COUNTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

M. Roberts
DEPUTY

TWIN LAKES CANAL COMPANY,
an Idaho Corporation,

Plaintiff(s),

vs

WARREN CHOULES, an individual and
SESSILEE J. CHOULES, as Trustee of
the Choules Family Trust,

Defendant(s).

Case No. CV-2008-275

MINUTE ENTRY AND ORDER

DATE: September 4, 2008

APPEARANCES: Robert L. Harris, Attorney for Plaintiff
Blake S. Atkin, Attorney for Defendants

MATTERS BEFORE THE COURT: Motion for Preliminary Injunction

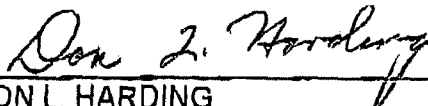
PROCEEDINGS: This matter came for hearing on this date. Mr. Atkin previously filed a Motion to Continue but was unable to schedule a hearing before today but still requested a continuance. Mr. Atkin further noted that after speaking with opposing counsel yesterday regarding an Amended Complaint which was filed to condemn the property, they may not need to continue with this hearing. Mr. Harris wanted clarification on some issues and objected to any continuance for the hearing today regarding the Preliminary Injunction.

Both parties agreed that an Injunction to prevent the defendants from using construction equipment on the reservoir or canal system may be entered by the Court.

IT IS HEREBY ORDERED that upon agreement of both parties the Temporary Restraining Order that prevents the defendants from using construction equipment shall be continued until further order of the Court. This Order shall apply to both the reservoir and canal system.

IT IS FURTHER ORDERED the defendants shall not use any construction equipment on the reservoir or canal system.

DATED this 4th day of September, 2008.


DON L. HARDING
District Judge

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on the 4th day of September, 2008, I mailed/served/faxed a true copy of the foregoing document on the attorney(s)/person(s) listed below by mail with correct postage thereon or causing the same to be hand delivered.

Attorney(s)/Person(s):

Robert L. Harris
Attorney for Plaintiff

Blake S. Atkin
Attorney for Defendants

Method of Service:

Faxed: 523-9518

Faxed: 1-801-533-0380

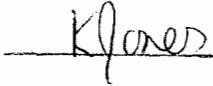
V. ELLIOTT LARSEN, Clerk

BY: 
Linda Hampton, Deputy

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FRANKLIN COUNTY CLERK


DEPUTY

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7579 North Westside Highway
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Telephone: (208) 747-3414

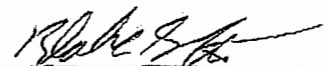
ATKIN LAW OFFICES, P.C.
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Bountiful, Utah 84010
Telephone: (801) 533-0300
Fax: (801) 533-0380

Attorneys for Defendants

**IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
FRANKLIN COUNTY, STATE OF IDAHO**

<p>TWIN LAKES CANAL COMPANY, an Idaho Corporation,</p> <p>Plaintiff,</p> <p>v.</p> <p>WARREN CHOULES, an individual, and SESSILEE J. CHOULES, as Trustee of the Choules Family Trust,</p> <p>Defendants.</p>	<p>MOTION TO DISMISS AMENDED VERIFIED COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED</p> <p>Case No. cv-08-275</p>
--	--

Defendants respectfully move this Court to dismiss counts two and three of Plaintiff's Amended Verified Complaint for failure to state a claim upon which relief may be granted. Defendants request oral argument on this motion and will file a memorandum in support of this motion at least 14 days before the hearing on this matter.

DATED this 5th day of September, 2008.
Blake S. Atkin
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September, 2008, I served a true and correct copy of the foregoing **MOTION TO DISMISS AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED** upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

6th Judicial District Court of Idaho
Franklin County Courthouse
Clerk of the Court
39 West Oneida
Preston, ID 83276
Telephone 208-852-1090
Facsimile 208-852-2926

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Robert L. Harris
Holden, Kidwell, Hahn & Crapo,
P.L.L.C.
1000 Riverwalk Drive, Suite 200
Idaho Falls, Idaho 83402
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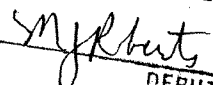
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Wayne Bartle

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Attorney for Defendants

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FRANKLIN COUNTY CLERK

DEPUTY

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
FRANKLIN COUNTY, STATE OF IDAHO

TWIN LAKES CANAL COMPANY,
an Idaho Corporation,

Plaintiff,

v.

WARREN CHOULES, an individual, and
SESSILLEE J. CHOULES, as Trustee of the
Choules Family trust.

Defendants.


**Notice of hearing on Motion to dismiss for
failure to state a claim upon which relief
can be granted**

Case No. CV-08-275

Please take notice that defendants motion to dismiss plaintiff's amended complaint will be heard on December 11, at 2:45, P.M. at the Franklin County Courthouse.

Dated this 27 day of October, 2008

Atkin Law Offices
Attorneys for the defendants


Blake S. Atkin

CERTIFICATE OF SERVICE

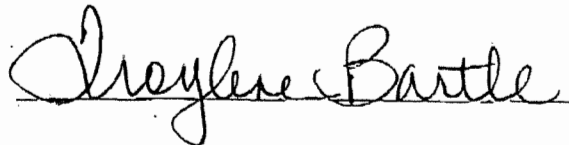
I HEREBY CERTIFY that on this 27th day of October, 2008, I served a true and correct copy of the foregoing **NOTICE OF HEARING** upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

6th Judicial District Court of Idaho
Franklin County Courthouse
Clerk of the Court
39 West Oneida
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FRANKLIN COUNTY CLERK

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Attorney for Defendants

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
FRANKLIN COUNTY, STATE OF IDAHO

TWIN LAKES CANAL COMPANY,
an Idaho Corporation,

Plaintiff,

v.

WARREN CHOULES, an individual, and
SESSILLEE J. CHOULES, as Trustee of the
Choules Family trust.

Defendants.

**DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS
DAMAGE CLAIMS**

Case No. CV-08-275

Defendants, by and through undersigned counsel, hereby respectfully submit this
Memorandum in Support of Motion to Dismiss Damage Claims.

FACTS

1. Plaintiff is the owner of a dam which creates Twin Lakes Reservoir.

2. Defendants' land adjacent to Twin Lakes Reservoir is overflowed by the waters of the reservoir seasonally. During the rest of the year, the land is dry.

3. By prior action, case number CV-04-241, Defendants obtained a permanent injunction preventing Plaintiff from filling Twin Lakes above a prescriptive overflow easement to fill Twin Lakes Reservoirs to a gauge height 75.2.

4. Idaho Code § 5-246 was enacted in 1991, before the Complaint was filed in case CV-04-241.

5. Plaintiff claims that its injury arises from Defendants' placement of earth and rock on Defendants' property below gauge height 75.2 in Twin Lakes which "reduced the volume of space that Twin Lakes can use to store water." Plaintiff also asserts that Defendants have interfered with a "clay lining" on the property. Neither of these claims can survive an analysis of Idaho Code § 5-246.

SUMMARY OF ARGUMENT

Since its enactment in 1991, Idaho Code § 5-246 governs overflow easements and the respective rights of dam operators and the land owners with respect to such easements. Idaho Code § 5-246 specifically states: "[t]he provisions of this section shall not be construed to . . . restrict any use of the underlying property for any purpose otherwise consistent with ownership thereof, even if said use interferes with the storage of water on the property." Both of Plaintiff's allegations, pushing materials during the dry season below gauge height 75.2 and causing a leak in the clay lining may "interfere with the storage of water on the property," but even if they did, it is not actionable because it is a use of the property "...consistent with ownership thereof..."

ARGUMENT

Plaintiff's right to store water on Defendants' property arises from a Judgment, in a case filed in 2004, determining that Plaintiff had an overflow easement which allows the Plaintiff "to raise the level of the Twin Lakes Reservoir above the 75 gauge mark...", but enjoining Plaintiff from raising the waters of the lake beyond gauge mark 75.2. (Case No. CV-04-241 Mem. & Order Granting Def. Mot. Summ. J. 8.). Idaho Code § 5-246 governs such overflow easements. At the first session of Plaintiff's motion for preliminary injunction, the Court asked the parties to brief Idaho Code § 5-246 and address the issue of whether it gives the Plaintiff the right to stop Defendants from using heavy equipment from contouring their property and/or from storing earth, rocks and other rip rap on their property.

In interpreting a statute, the starting place is always the clear language of the legislation. Only if the language is not clear should the Court resort to other methods of interpretation. *State v. Mubita*, 188 P.3d 867, 882 (Idaho 2008). In this case, the language of the statute is as clear as the English language can make it. When one looks at that language in light of the history prompting the passage of the legislation, the language becomes unmistakable. Before the statute was passed, a prescriptive overflow easement could not be obtained because the natural "rise and fall" of the water would not constitute "continuous" occupation to satisfy the common law requirements for a use by prescription. See, *Baranick v. North Fork Reservoir Co.*, 903 P.2d 71, 72 (Idaho 1995); See also, *Deffenbaugh v. Washington W. Power Co.*, 135 P. 247, 249-50 (Idaho 1913), and *Lavin v. Panhandle Lumber Co.*, P.2d 186, 190 (Idaho 1931)(the Court held that a dam operator who causes periodic flooding to the property of a riparian landowner does not

acquire a prescriptive right to flood that property in the future. In both cases the Court denied the dam operator's easement claim by holding that flooding for only a portion of each year did not commence the running of the prescriptive period).

The holding in the *Deffenbaugh* case was the main impetus for the enactment of Idaho Code § 5-246, providing a statutory overflow easement for dam operators that would not require consistent water levels that were required in a prescriptive, common law easement. *See*, 51st Leg., 1st Reg. Sess. (Idaho 1991). At the same time, the legislature recognized it was enacting legislation that curtailed real property rights and did not want to severely impact the real property rights of the owner of the underlying ground. In that light, the meaning of the statute is crystal clear. Idaho Code § 5-246, states in relevant part:

...owner of a dam shall be deemed to have obtained a nonexclusive prescriptive overflow easement over real property which has been inundated or overflowed by the operations of the dam for at least a part of a year for any consecutive five (5) year period prior to commencement of an action by the property owner seeking relief inconsistent with such nonexclusive prescriptive overflow easement....The provisions of this section shall not be construed to affect the riparian and littoral rights of property owners to have access to and use of waters in this state, or to restrict any use of the underlying property for any purpose otherwise consistent with ownership thereof, even if said use interferes with the storage of water on the property.

(Emphasis added).

As the emphasized language points out, only a “nonexclusive” prescriptive easement is created by the statute. The legislature’s use of the term “nonexclusive” is instructive.

If that were not enough, the legislature went further. It expressly stated in the statute that the owner of the underlying property could not be restricted in “any use of the underlying

property for any purpose otherwise consistent with ownership thereof, even if said use interferes with the storage of water on the property.” *Id.* By this language the legislature made it clear that the easement it was creating was not like a normal common law easement. At common law, as pointed out by Twin Lakes in the cases it has cited, the easement holder has the “dominant estate,” and the property holder has a “servient estate” that cannot be used in such a way as to interfere with the easement. Under the statute to the contrary, the underlying property can be used by its owner for any purpose “even if said use interferes with the storage of water on the property.” The legislation is thus in derogation of the common law of easements and the common law of easements should not be resorted to for interpretation of this statute.

The intent of the Idaho legislature is clear: the purpose of Idaho Code § 5-246 was “to provide for prescriptive easements for dam operations,” and “to protect certain private... property rights” and to “provide the effect on prescriptive overflow easements previously acquired under common law.” H.B 346, 51st Leg., 1st Reg. Sess. (Idaho 1991).

So, in interpreting the statute for purposes of this case, the Court needs to ask itself “is the use Plaintiff is trying to restrict Defendants from putting the property to ‘consistent with ownership of the property?’” If it is, Defendants are entitled to put their property to that use “even if said use interferes with the storage of water on the property.” Plaintiff’s chief complaint is that its injury arises from Defendants’ placement of earth and rock on Defendants’ property below height 75.2 in Twin Lakes which “reduced the volume of space that Twin Lakes can use to store water.” (Plaintiff’s Compl., ¶¶ 8-9). Owners of land often change the contours of the land and often landscape the property and store dirt, rocks and other items on their land. Under

the clear language of the statute, the Defendants cannot be restricted from placing dirt and rock on their underlying land, even if this use interferes with the storage of water, as this land use is not inconsistent with ownership of their property.

The Plaintiff cannot be granted injunctive relief because it has incurred no right under the statute to be free from Defendants' land use. In light of the law, a preliminary injunction is not proper because Plaintiff has not established a likelihood of success on the merits and therefore is not entitled to the relief demanded.

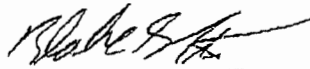
Second, Plaintiff claims that Defendants' "use of heavy equipment below gauge height 75.2 has damaged a clay lining which Twin Lakes installed in the reservoir...when the lining is disturbed additional water is lost to leakage." (Plaintiff's Compl., ¶ 10). Under the governing statute, Idaho Code § 5-246, the owner of the underlying property cannot be restricted in a proper use of his ground even if this use interferes with the storage of water on the property. Under the statute, the Plaintiff has no right to be protected from Defendants' land use.

CONCLUSION

Defendants have a right to use their property as they see fit even if such usage interferes with Plaintiff's overflow easement. Plaintiff cannot, in light of the clear mandate of Idaho Code § 5-246 show that Defendants have caused it injury from which it is owed protection. WHEREFORE, Defendants request that Plaintiff's claims for damages be dismissed and that Defendants be awarded their attorney fees in bringing this motion.

Dated this 25th day of November, 2008.

ATKIN LAW OFFICES, P.C



Blake S. Atkin
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of November, 2008, I served a true and correct copy of the foregoing **DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS DAMAGE CLAIMS** upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

6th Judicial District Court of Idaho
Franklin County Courthouse
Clerk of the Court
39 West Oneida
Preston, ID 83276
Telephone 208-852-1090
Facsimile 208-852-2926

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☒ Facsimile

Holden, Kidwell, Hahn & Crapo,
P.L.L.C.
1000 Riverwalk Drive, Suite 200
Idaho Falls, Idaho 83402
Telephone 208-523-0620
Facsimile 208-523-9518

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LINDSAY SCOTT

Blake S. Atkin (ISB# 6903)
7579 North Westside Highway
Clifton, Idaho 83228
Telephone: (208) 747-3414

ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Bountiful, Utah 84010
Telephone: (801) 533-0300
Facsimile: (801) 533-0380
Email: batkin@atkinlawoffices.net

Attorney for Defendant

FILED

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FRANKLIN COUNTY CLERK

Klauer
DEPUTY

**IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
FRANKLIN COUNTY, STATE OF IDAHO**

TWIN LAKES CANAL COMPANY, an
Idaho Corporation,
Plaintiff,

v.s.

WARREN CHOULES, an individual, and
SESSILEE J. CHOULES, as Trustee of the
Choules Family trust,

Defendants.

NOTICE OF APPEARANCE OF COUNSEL

Case No. cv-08-275

COMES NOW Blake S. Atkin, of Atkin Law Offices, P.C., and enters his appearance as counsel for Defendants WARREN CHOULES, in individual, and SESSILEE J. CHOULES, as Trustee of the Choules Family Trust, in the above-entitled matter.

DATED this 8th day of December, 2008.

ATKIN LAW OFFICES, P.C.

Blake S. Atkin

Blake S. Atkin
Attorney for Defendants

MAILING CERTIFICATE

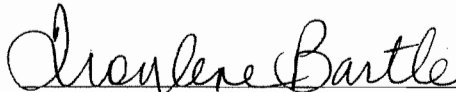
I HEREBY CERTIFY that on the 8th day of December, 2008, I served a copy of the foregoing **NOTICE OF APPEARANCE OF COUNSEL** on each of the following by the method indicated below:

Sixth Judicial District Court
39 West Oneida
Preston, Idaho 83263
Telephone: (208) 852-0877
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Robert L. Harris, Esq.
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MICHAEL W. MOORE (ISBN 1919)
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 Boise, Idaho 83707
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DEC 10 2008

Attorneys for Defendants Warren and Sessilee Choules

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ~~FRANKLIN~~

TWIN LAKES CANAL COMPANY,)
 an Idaho corporation,)

Plaintiff,)

vs.)

WARREN CHOULES, an individual,)
 and SESSILEE J. CHOULES, as)
 Trustee of the Choules Family Trust,)

Defendants.)

Case No. CV-2008-275

NOTICE OF APPEARANCE

(Filing Fee: \$58.00)

PLEASE TAKE NOTICE that Michael W. Moore and Steven R. Kraft of the law firm of Moore, Baskin & Elia, LLP, enter an appearance on behalf of the Defendants in the above-entitled action.

NOTICE OF APPEARANCE - P. 1

These Defendants hereby specifically reserve all defenses as to lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper venue, insufficiency of process, failure to state a claim upon which relief can be granted, failure to join an indispensable party and any other defense available to Defendants.

Dated this 10th day of December, 2008.

~~MOORE, BASKIN & ELIA, LLP~~

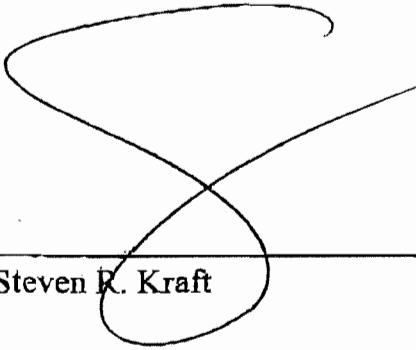
By _____
Steven R. Kraft, of the firm
Attorneys for Defendants Warren Choules and
Sessilee Choules

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 10th day of December, 2008, I served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

Robert L. Harris
Holden, Kidwell, Hahn & Carpo,
PLLC
1000 Riverwalk Dr., Ste. 200
P. O. Box 50130
Idaho Falls, ID. 83405-0130

☒ U.S. Mail, postage prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile Transmission 208-523-9518
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Steven R. Kraft

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FILED

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FRANKLIN COUNTY CLERK

Myrl
DEPUTY

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

TWIN LAKES CANAL COMPANY, an
Idaho Corporation,

Plaintiff,

vs.

WARREN CHOULES, an individual, and
SESSILEE J. CHOULES, as Trustee of the
Choules Family Trust,

Defendants.

Case No. CV-2008-0275

**MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

Twin Lakes Canal Company ("Twin Lakes"), by and through its attorney of record,
Robert L. Harris, Esq., of HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C., hereby submits this
Memorandum in Opposition to Defendants' Motion to Dismiss.

I. INTRODUCTION AND PROCEDURAL HISTORY

Twin Lakes is an Idaho Corporation which provides irrigation water to its shareholders. Twin Lakes owns and operates the Twin Lakes Canal and Twin Lakes Reservoir, both of which are located in Franklin County, Idaho. Twin Lakes delivers water for irrigation purposes to a service area of approximately 25,000 acres primarily located on the west side of Franklin County.

The Choules Family Trust ("Choules") owns property which is partially covered by Twin Lakes Reservoir (the "Choules Property"). In 2004, Choules sued Twin Lakes for various causes of action, one of which related to Twin Lakes' storage of water on the Choules Property. In 2006, Twin Lakes was awarded a Judgment in Franklin County Case No. CV-04-241 declaring that Twin Lakes owns an "easement to fill the Twin Lakes Reservoir to a gauge height 75.2 on the Choules Property.

At some point prior to November 2007, Defendants began using heavy equipment to move earth, rocks, concrete, and other debris from elsewhere on the Choules Property to areas below gauge height 75.2 in Twin Lakes Reservoir. Twin Lakes was concerned that by moving earth, rocks, concrete, or other debris to areas below gauge height 75.2 on Twin Lakes Reservoir, because the Defendants reduced the volume of space that Twin Lakes can use to store water for its shareholders. Twin Lakes was also concerned that use of heavy equipment below gauge height 75.2 on Twin Lakes Reservoir damaged a clay lining which Twin Lakes previously installed to plug a leak in the Twin Lakes Reservoir.

In addition, Defendants performed work on the Choules Property above the level of Twin Lakes Reservoir, but directly below the Twin Lakes Canal. The Twin Lakes Canal is located on a very sensitive area of the Choules Property, as it traverses a steep gradient, and requires support

below it to exist. Twin Lakes is concerned that removal of support material below the canal substantially increases the risk of a canal washout, which would be devastating to Twin Lakes' shareholders.

Despite requests from Twin Lakes for Defendants to cease earth moving work on the Choules Property, Defendants continued to perform such work, thereby causing additional damage to the Twin Lakes Reservoir and Twin Lakes Canal. Twin Lakes was left with no choice but to file a Complaint against the Defendants, which was superseded by an Amended Complaint filed on August 26, 2008. The Amend Complaint seeks condemnation of the Choules Property, a preliminary injunction prohibiting Defendants from using heavy equipment on the Choules Property, and for damages caused by the Defendants' activities.

On September 5, 2008, Defendants filed a Motion to Dismiss Amended Verified Complaint for Failure to State a Claim Upon Which Relief May be Granted. The motion itself did not specify which claim or claims Defendants were seeking to dismiss. The only item contained in the motion was that Defendants indicated that they would file a brief at least 14 days before the hearing on this matter. No hearing was scheduled at the time the motion was filed.

However, Defendants finally scheduled a hearing on the motion on October 27, 2008, which scheduled the hearing on December 11, 2008 at 2:45 p.m.

In early November, Twin Lakes was contacted by attorneys from the law firm of Moore, Basin & Elia, LLP, who indicated that they would be representing Defendants through Defendants' insurers, but indicated that there had been some difficulty with coordinating with Defendants and their existing counsel. On November 25, 2008, Defendants, through Mr. Atkin, submitted "Defendants' Memorandum in Support of Motion to Dismiss Damage Claims."

Shortly after Defendants' submission of their brief, Twin Lakes was contacted by Mr. Steven Kraft and asked to vacate the hearing date on the motion to dismiss. At this point, it was unclear which counsel would be represented the Defendants, and Twin Lakes agreed to vacate the hearing. However, the court did schedule a telephonic status conference at the same date and time as the vacated motion to dismiss hearing. At that hearing, the parties reported on their status, and the hearing on the motion to dismiss was rescheduled to February 12, 2009. This memorandum is in response to the motion to dismiss scheduled to be heard on February 12, 2009.

For the reasons set forth below, Defendants motion to dismiss should be denied.

II. ARGUMENT.

A. The Court Should Deny Defendant's Motion Because Twin Lakes Has Stated a Claim for Which Relief Can be Granted.

The Idaho Supreme Court has held that "a motion to dismiss, presented under I.R.C.P. 12(b)(6), has generally been viewed with disfavor," *Hadfield v. State ex rel. Burns*, 86 Idaho 561, 568, 388 P.2d 1018, 1022 (1964), and that "every possible intendment will be made to sustain a complaint against a motion to dismiss for failure to state a claim," *Idaho Comm'n on Human Rights v. Campbell*, 95 Idaho 215, 217, 506 P.2d 112, 114 (1973). In evaluating the motion, courts should draw all inferences in favor of the plaintiff and "then ask whether a claim for relief has been stated." *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995). In this case, Twin Lakes has stated a claim for relief. Therefore, Defendants' motion should be denied.

Count two of the complaint seeks an injunction to prevent further damage to Twin Lakes' easement and count three seeks damages for harm to Twin Lakes's easement already incurred. The Idaho Supreme Court recognizes a cause of action for damages to the use and enjoyment of an easement. *Nampa & Meridian Irr. Dist. v. Mussell*, 139 Idaho 28, 72 P.3d 868 (2003). In *Mussell*,

the court held that excavation work that threatened the stability of a canal “clearly constituted unreasonable interference with the District’s easement. Thus, the district court did not err in finding that the Mussells were liable for damages.” *Id.* at 33, 72 P.3d at 873. The court also held that the appropriate measure of damages in that case was “the cost of repairing or restoring” the damage inflicted. *Id.* at 34, 72 P.3d at 873. Clearly, a cause of action for damages to an easement will stand in Idaho. Because Twin Lakes has stated such a claim, Defendants’ motion to dismiss should be denied.

Defendants attempt to undermine the clear holding of cases such as *Mussell* by claiming that on the specific facts of this case Twin Lakes “has incurred no right under the statute [I.C. § 5-246] to be free from Defendants’ land use.” Defs.’ Mem. in Supp. of Mot. to Dismiss at 6. In essence, the Defendants suggest that the remedies available to the owners of easements vary depending on the type of easement that is at issue, and that somehow owners of prescriptive overflow easements are not entitled to damages at all. However, Defendants cite no authority supporting such a distinction. As indicated above, the authority dealing with easements clearly indicates that damages are available. *Mussell*, 139 Idaho at 33, 72 P.3d at 873. Further, as explained more fully below, the statute cannot be construed as an alteration to the common law rule allowing damages for unreasonable interference with an easement.

In short, in Idaho a cause of action for damages will lie where the owner of a servient estate unreasonably interferes with an easement. In this case, Twin Lakes has alleged a claim for damage to a recognized easement, and consequently Twin Lakes has stated a claim for which relief can be granted. Thus, this Court should dismiss Defendants’ motion.

A. Idaho Code § 5-246 Does Not Modify the Common Law Rules Applicable to All Easements.

1. The Law in Idaho Clearly Prohibits Unreasonable Interference With the Use and Enjoyment of an Easement.

Defendants acknowledge that Twin Lakes is the owner of an easement which allows it to raise Twin Lakes Reservoir to a gauge height of 75.2. Defs.' Mem. in Supp. of Mot. to Dismiss at

3. The Idaho Supreme Court has succinctly summarized the law governing easements:

The law is well settled with respect to the correlative rights of dominant and servient owners of easements. The owner of the servient estate is entitled to use the estate in any manner not inconsistent with, or which does not *materially interfere* with, the use of the easement by the owner of the dominant estate. *See Boydston Beach Ass'n v. Allen*, 111 Idaho 370, 377, 726 P.2d 914, 921 (Ct.App. 1986). In other words, the servient estate is entitled to make uses of the property that do not *unreasonably interfere* with the dominant owner's enjoyment of the easement. *See Carson v. Elliot*, 111 Idaho 889, 890, 728 P.2d 778, 779 (Ct.App. 1986). Thus, an easement owner is entitled to relief upon a showing that he is obstructed from exercising the privileges granted in the easement. *See Boydston Beach*, 111 Idaho at 377, 726 P.2d at 921.

Nampa & Meridian Irr. Dist. v. Washington Federal Savings, 135 Idaho 518, 522, 20 P.3d 702, 706 (2001) (citations omitted) (emphasis added).

The *Nampa & Meridian Irrigation District* case and the cases it cites clearly establish that in Idaho the owner of the servient estate cannot unreasonably interfere with the use and enjoyment of the easement. *Accord Luce v. Marble*, 142 Idaho 264, 273, 127 P.3d 167, 176 (2005) ("So long as his use does not interfere with the owner's *full use* and enjoyment of her easement a servient landowner may always make *reasonable* use of the land burdened by an easement.") (emphasis added); *Conley v. Whittlesey*, 133 Idaho 265, 985 P.2d 1127 (1999) (stating that the "owner of the servient estate is entitled to use the estate in any manner not inconsistent with, or which does not *materially interfere* with, the use of the easement by the owner of the dominant estate") (emphasis

added). In *Carson*, the court went so far as to contrast the relative rights of the owners of the dominant and servient estates.

Because an easement authorizes the limited use of the subject property, the landowner is entitled to make other uses of the property that do not *unreasonably interfere* with the enjoyment of the easement . . . Conversely, the easement owner is entitled to *full* enjoyment of the easement.

111 Idaho at 890, 728 P.2d at 779 (emphasis added).

Two years after *Nampa & Meridian Irr. Dist.*, the Idaho Supreme Court affirmed the reasonable/unreasonable distinction in the context of an easement with an interference. In another case brought by the same irrigation district against a landowner, the court again held that

the owners of the servient estate . . . could use their property in any manner not inconsistent with, or which did not *materially interfere* with the District's use of its easement. In other words, the [landowners] were entitled to make any uses of their property which did not *unreasonably interfere* with the District's enjoyment of its easement.

Nampa & Meridian Irr. Dist. v. Mussell, 139 Idaho 28, 33, 72 P.3d 868, 873 (2003) (citations omitted) (emphasis added). The court made it clear that "[t]he District was entitled to relief upon a showing that the [landowners] *unreasonably interfered* with its easement." *Id.* (emphasis added). Idaho courts have held that "[w]hether a particular use by the landowner is an unreasonable interference with enjoyment of the easement is a question of fact." *Carson*, 111 Idaho at 890, 728 P.2d at 779 (citation omitted). In *Mussell*, the court found that excavation which "would have cause [a] Lateral to fail if it were filled with water . . . constituted an unreasonable interference with the District's easement," and thus held that the district court had properly awarded damages. 139 Idaho at 33, 72 P.3d at 873.

Despite the foregoing, Defendants argue that they are entitled to make any use of the property

they wish and that the damage they cause to the Twin Lakes Reservoir “is not actionable.” Defs.’ Mem. in Supp. of Mot. to Dismiss at 2. However, there is nothing in the text of Idaho Code § 5-246 which overrules or changes the well-settled law with respect to easements. The language in the statute relied upon by Defendants is simply a restatement of well-settled Idaho law. Defendants, without citing to any cases which stand for such a proposition, only offered a slanted reading of Idaho Code § 5-246. These arguments are without merit, and therefore, Defendants’ motion to dismiss should be denied.

B. The Text of Idaho Code § 5-246 Does Not Indicate an Intent to Alter the Well-Settled Idaho Law on Easements, Contrary to Defendants’ Claims.

Idaho Code § 5-246 states that a party seeking to establish a prescriptive overflow easement must show that the area of the claimed easement has been inundated for a portion of each of the previous five (5) years. This section also states that an overflow easement shall not “restrict any use of the underlying property for any purpose otherwise consistent with ownership thereof, even if said use interferes with the storage of water on the property.”

Contrary to Defendants’ contention that the language of I.C. § 5-246 (permitting a use that “interferes” with water storage) gives them *carte blanche* to use their property in any manner that interferes with Twin Lakes’ easement, Idaho Code § 5-246 is entirely consistent with the rule established by *Boydston Beach, Carson, Nampa & Meridian Irr. Dist., Luce, Conley, and Mussell*. Nowhere in those cases did the court forbid any interference. Instead, the court only prohibited *unreasonable* or *material* interference. The provisions of § 5-246 should be read in light of that distinction.

In *D&M Country Estates Homeowner’s Ass’n v. Romriell*, 138 Idaho 160, 165, 59 P.3d 965, 970 (2002), the court in that case held that “courts must construe a statute under the assumption that

the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed.”). Thus, Idaho Code § 5-246 allows uses of the property which *reasonably* interfere with the storage of water, but does not allow an owner to *unreasonably* or *materially* interfere with water storage.

Defendants assume that by choosing the language it did, “the legislature made it clear that the easement it was creating was not like a normal common law easement.” Defs.’ Mem. in Supp. of Mot. to Dismiss at 5. However, that assertion is completely unsupported. As an initial matter, Idaho Code § 5-246 did not create the overflow easement. The statute itself says that “[n]othing herein shall be deemed to affect any prescriptive overflow easement that any dam owner may have *previously acquired under common law*.” (Emphasis added). Rather, Idaho Code § 5-246 merely codified a change to one of the elements to obtain a prescriptive overflow easement by requiring that the inundation only had to occur once in a year for five consecutive years, rather than require that a reservoir remain at a that level for the entire year for five consecutive years. *See Baranick v. North Fork Reservoir Co.*, 127 Idaho 482, 482-83, 903 P.2d 71, 71-72 (1995).

More fundamentally, however, Defendants’ argument ignores the rule that in Idaho that “changes in the common law by adoption of a statute may not be presumed, nor may such changes be accomplished by legislation of doubtful implication.” *Industrial Indem. Co. v. Columbia Basin Steel & Iron Inc.*, 93 Idaho 719, 723, 471 P.2d 574, 579 (1970). Nowhere in Idaho Code § 5-246 does the legislature expressly state that the easement it is discussing should be governed by standards different from the common law rules set forth above, and the statute’s contents do not permit the implication that the Legislature intended to change the common law.

The Defendants make much of the fact that Idaho Code § 5-246 provides the means for

obtaining a “*nonexclusive* prescriptive overflow easement.” (Emphasis added.) However, that language is entirely consistent with the common law governing all easements. *Carson v. Elliott*, 111 Idaho 889, 890, 728 P.2d 778, 779 (Ct. App. 1986) (noting that “an easement authorizes *limited* use of the subject property”) (emphasis added). Defendants also point out that Idaho Code § 5-246 allows the defendant to use his land for “any purpose otherwise consistent with ownership thereof . . .” This phrase, too, tracks the common law rules. *Drew v. Sorensen*, 133 Idaho 534, 989 P.2d 276 (1999) (“A servient landowner may always use the land burdened by the easement, so long as he or she does not interfere with the dominant estate’s *full enjoyment* of the easement.”).

Thus, any suggestion that the language of the statute evidences an intent to change the common law is without merit. Defendants’ motion to dismiss should therefore be denied.

C. The Legislative History of Idaho Code § 5-246 Does Not Indicate an Intent to Alter the Common Law Rule.

Defendants’ suggest, without citation to authority, that the “history prompting the passage of the legislation” makes it “unmistakable” that § 5-246 permits Defendants to unreasonably interfere with Twin Lakes’ easement. Defs.’ Mem. in Supp. of Mot. to Dismiss at 3. This unsupported assertion is insufficient to establish an intent to change the common law.

First, it is significant that the legislature placed this section among the provisions of Title 5 dealing with limitations of on action (i.e., statutes of limitation), *not* among the substantive water and water-related provisions of Titles 42 and 43. This fact is strong indicia that the legislature *did not* intend for prescriptive overflow easements to be analyzed any differently than other types of easements.

Additionally, in an effort to investigate the merits of Defendants’ argument, Twin Lakes contacted the Idaho Legislative Reference Library and requested all of the materials associated with

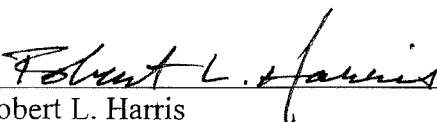
two bills that created § 5-246: House Bill 346 (1991) and Senate Bill 1251 (1991). Although the floor debates were not preserved, Twin Lakes obtained a copy of all the relevant materials that the Reference Library did have. A copy of those materials is attached as Exhibit A of the Affidavit of Daniel Dansie filed herewith. There is nothing in the materials provided by the Idaho Legislative Reference Library to support the contention that the legislature intended to modify the reasonable/unreasonable distinction established by Idaho case law.

We are unclear which legislative history Defendants feel supports their arguments, but we cannot find such support. We simply invite the court to review this legislative history.

III. CONCLUSION.

In this case, Twin Lakes alleges that the Defendants have unreasonably interfered with Twin Lakes' easement resulting in damage. The law governing easements in Idaho is clearly established and allows a Twin Lakes to seek damages for unreasonable interference with the use and enjoyment of the easement. Defendants' contention that damages are not available in the context of the easement at issue in this case lacks the support of any authority. Thus, Twin Lakes has raised a claim for which relief can be granted. This Court should therefore deny Defendants' motion.

DATED this 23rd day of December, 2008.


Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 23rd day of December, 2008.

DOCUMENT SERVED: MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS

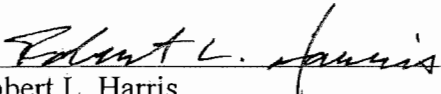
SERVED UPON:

Michael W. Moore
Moore, Baskin & Elia, LLP
P.O. Box 6756
Boise, Idaho 83707

☒ First Class Mail
☐ Hand Delivery
☐ Facsimile
☐ Other _____

Blake S. Atkin
7579 North Westside Highway
Clifton, Idaho 83228

☒ First Class Mail
☐ Hand Delivery
☐ Facsimile
☐ Other _____


Robert L. Harris
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

Robert L. Harris, Esq. (ISB #7018)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
Idaho Falls, Idaho 83402
P.O. Box 50130
Idaho Falls, Idaho 83405-0130
Telephone: (208) 523-0620
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FILED

08 DEC 24 AM 11:05

FRANKLIN COUNTY CLERK

My Roberts
DEPUTY

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

TWIN LAKES CANAL COMPANY, an
Idaho Corporation,

Plaintiff,

vs.

WARREN CHOULES, an individual, and
SESSILEE J. CHOULES, as Trustee of the
Choules Family Trust,

Defendants.

Case No. CV-2008-0275

AFFIDAVIT OF DANIEL C. DANSIE

COMES NOW Daniel C. Dansie and hereby submits the following affidavit:

1. The statements made in this affidavit are made upon my personal knowledge
except where otherwise specifically stated.

2. I am an attorney with the law firm Holden, Kidwell, Hahn & Crapo, P.L.L.C.

3. On December 1, 2008, I contacted the Idaho Legislative Reference Library in
Boise to request any materials related to the legislative history of House Bill 346 (1991) and

Senate Bill 1251 (1991), the two pieces of legislation that created Idaho Code § 5-246. I was informed that although floor debates are not preserved, the Library may have other documents indicating legislative purpose or intent.

4. On the same day, Mark Robertson, a Library Research Assistant, contacted me and indicated that he was able to locate some materials related to the legislation. I responded and asked him to send me the information he was able to locate.

5. On December 2, 2008, Mr. Robertson did in fact send me materials related to the legislative history of House Bill 346 (1991) and Senate Bill 1251 (1991).

6. A true and correct copy of all the legislative materials received from the Idaho Legislative Reference Library is attached as Exhibit A.

7. I am over the age of twenty-one (21) years and would testify to the foregoing if called upon in a court of law.

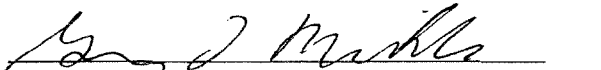
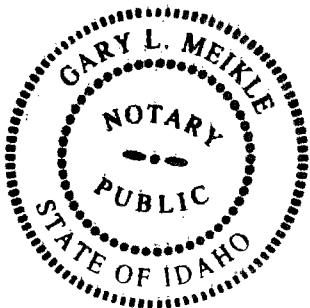
Dated this 19 day of December, 2008.



Daniel C. Dansie
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

Subscribed and sworn to before this 19 day of December, 2008.

(Seal)



Notary Public for Idaho
Residing at: Idaho Falls, ID
My Commission Expires: 12/15/09

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 23 day of December, 2008.


DOCUMENT SERVED: Affidavit of Daniel C. Dansie
SERVED UPON:

Michael W. Moore
Moore, Baskin & Elia, LLP
P.O. Box 6756
Boise, Idaho 83707

☒ First Class Mail
☐ Hand Delivery
☐ Facsimile
☐ Other _____

Blake S. Atkin
7579 North Westside Highway
Clifton, Idaho 83228

☒ First Class Mail
☐ Hand Delivery
☐ Facsimile
☐ Other _____


Robert L. Harris
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

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Exhibit A

LEGISLATURE OF THE STATE OF IDAHO

Fifty-first Legislature

First Regular Session — 1991

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 346

BY RESOURCES AND CONSERVATION COMMITTEE

AN ACT

RELATING TO LIMITATIONS OF ACTIONS; AMENDING CHAPTER 2, TITLE 5, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 5-246, IDAHO CODE, TO PROVIDE FOR PRESCRIPTIVE EASEMENTS FOR DAM OPERATIONS, TO PROVIDE TIME LIMITS FOR ACTIONS SIMILAR TO THOSE FOR OTHER PRESCRIPTIVE EASEMENTS, TO PROVIDE SAID EASEMENT MAY NOT BE SUBJECT TO FORFEITURE IF THE FAILURE TO EXERCISE IS CAUSED BY LACK OF WATER, TO PROVIDE ONE YEAR FOR PROPERTY OWNERS TO INITIATE ACTIONS RELATED TO OVERFLOW OF LANDS BY DAM OPERATIONS OCCURRING IN THE PREVIOUS FIVE YEARS, TO PROTECT CERTAIN PRIVATE AND STATE PROPERTY RIGHTS, AND TO PROVIDE THE EFFECT ON PRESCRIPTIVE OVERFLOW EASEMENTS PREVIOUSLY ACQUIRED UNDER COMMON LAW.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 2, Title 5, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 5-246, Idaho Code, and to read as follows:

5-246. PRESCRIPTIVE OVERFLOW EASEMENTS. In conformity with the limitations of actions time period set forth in sections 5-203 through 5-206, Idaho Code, the owner of a dam shall be deemed to have obtained a nonexclusive prescriptive overflow easement over real property which has been inundated or overflowed by the operations of the dam for at least a part of a year for any consecutive five (5) year period prior to commencement of an action by the property owner seeking relief inconsistent with such nonexclusive prescriptive overflow easement. Said dam owner shall be deemed to have not forfeited said nonexclusive prescriptive overflow easement if the reason for the failure to exercise the easement is a lack of water caused by drought or acts of God.

It is further provided that if a dam has inundated or overflowed real property for at least a part of a year for the five (5) consecutive years prior to the enactment of this section, then the owner of the dam shall be deemed to have obtained a nonexclusive prescriptive overflow easement hereunder over said real property one (1) year after the enactment of this section, provided, no action seeking relief inconsistent with such nonexclusive prescriptive overflow easement has been commenced by the property owner within one (1) year of the enactment of this section. The provisions of this section shall not be construed to affect the riparian and littoral rights of property owners to have access to and use of waters in this state, or to restrict any use of the underlying property for any purpose otherwise consistent with ownership thereof, even if said use interferes with the storage of water on the property. Nothing herein shall be deemed to affect any prescriptive overflow easement that any dam owner may have previously acquired under common law. The provisions of this section shall not be construed to apply to the beds of navigable waters lying below the natural or ordinary high watermark as defined in subsection (9) of section 58-104, Idaho Code.

which a liquor license has been issued need not be residents of the state.

02/28 House intro - 1st rdg - to printing
03/01 Rpt prt - to St Aff
03/06 Rpt out - rec d/p - to 2nd rdg
03/07 2nd rdg - to 3rd rdg
03/11 3rd rdg - PASSED - 78-4-1*
NAYS -- Geddes, Jones(29), Steger, Taylor.
Absent and excused -- Richardson.
Title apvd - to Senate
03/12 Senate intro - 1st rdg - to St Aff
03/21 Rpt out - rec d/p - to 2nd rdg
03/22 2nd rdg - to 3rd rdg
03/23 3rd rdg - PASSED - 42-0-0
NAYS--None.
Absent and excused--None.
Title apvd - to House
03/25 To enrol
Rpt enrol - Sp signed
03/26 Pres signed - to Governor
03/29 Governor signed
Session Law Chapter 179
Effective: 07/01/91

H340.....By Revenue & Taxation
GASOHOL - Amends existing law to redefine gasohol to eliminate the requirement that it be manufactured in the state.

02/28 House intro - 1st rdg - to printing
03/01 Rpt prt - to Rev/Tax
03/06 Rpt out - rec d/p - to 2nd rdg
03/07 2nd rdg - to 3rd rdg
03/12 3rd rdg - PASSED - 81-0-2*
NAYS -- None.
Absent and excused -- Childers, Peters.
Title apvd - to Senate
03/13 Senate intro - 1st rdg - to Loc Cov
03/23 Rpt out - rec d/p - to 2nd rdg
03/25 2nd rdg - to 3rd rdg
03/27 3rd rdg - PASSED - 41-0-1
NAYS--None.
Absent and excused--Hawkins.
Title apvd - to House
03/28 To enrol
03/29 Rpt enrol - Sp signed
04/01 Pres signed - to Governor
04/04 Governor signed
Session Law Chapter 307
Effective: 04/04/91

H341.....By Revenue & Taxation
SNOWMOBILES - BOATS - FEES - SEARCH AND RESCUE ACCOUNT - Amends existing law to increase snowmobile and boat registration fees and to provide a portion of the revenues for deposit in the Search and Rescue Account.

02/28 House intro - 1st rdg - to printing
03/01 Rpt prt - to Rev/Tax

H342.....By Appropriations
APPROPRIATIONS - An act appropriating moneys for fiscal year 1992 to the Office of the Governor for the State Insurance Fund.

02/28 House intro - 1st rdg - to printing
03/01 Rpt out - rec d/p - to 2nd rdg
03/04 2nd rdg - to 3rd rdg
03/06 3rd rdg - PASSED - 69-3-11*
NAYS -- Black(23), Schaefer, Tilman.
Absent and excused -- Crow, Gould, Jones(23), McEvoy, Nafziger, Newcomb, Parks, Richardson, Sali, Steger.
Present and excused -- Hansen(20).

--Continued--

Title apvd - to Senate
03/07 Senate intro - 1st rdg - to Fin
03/08 Rpt out - rec d/p - to 2nd rdg
03/11 2nd rdg - to 3rd rdg
03/15 3rd rdg - PASSED - 40-0-2
NAYS--None.
Absent and excused--Reed, Tominaga.
Title apvd - to House
03/18 To enrol
03/19 Rpt enrol - Sp signed
Pres signed
03/20 To Governor
03/21 Governor signed
Session Law Chapter 64
Effective: Section 3 - 03/21/91
All others - 07/01/91

H343.....By Appropriations
APPROPRIATIONS - An act appropriating moneys for fiscal year 1992 to the Lottery Commission.

02/28 House intro - 1st rdg - to printing
03/01 Rpt prt - to 2nd rdg
03/04 2nd rdg - to 3rd rdg
03/06 3rd rdg - PASSED - 75-6-2*
NAYS -- Frasure, Gould, Jones(29), Loertscher, McEvoy, Wood.
Absent and excused -- Grow, Parks.
Title apvd - to Senate
03/07 Senate intro - 1st rdg - to Fin
03/08 Rpt out - rec d/p - to 2nd rdg
03/11 2nd rdg - to 3rd rdg
03/19 3rd rdg - PASSED - 39-0-3
NAYS--None.
Absent and excused--Bilyeu, Newcomb, Sweeney
Title apvd - to House
03/20 To enrol
03/21 Rpt enrol - Sp signed
03/22 Pres signed
To Governor
03/26 Governor signed
Session Law Chapter 88
Effective: 07/01/91

H344.....By Business
INSURANCE - FINANCIAL INSTITUTION ACTIVITIES - Adds to existing law to prohibit financial institutions from selling most types of insurance.

02/28 House intro - 1st rdg - to printing
03/01 Rpt prt - to Bus

H345.....By Resources & Conservation
IRRIGATION DISTRICTS - Amends existing law to provide that an irrigation district elector must be assessed charges for the delivery of water in order to be qualified to vote in an irrigation district election.

02/28 House intro - 1st rdg - to printing
03/01 Rpt prt - to Res/Con
03/04 Rpt out - rec d/p - to 2nd rdg
03/05 2nd rdg - to 3rd rdg
03/08 3rd rdg - PASSED - 64-18-1*
NAYS -- Adams, Beaudoin, Black(27), Chamberlain, Childers, Flandro, Cannon, Jenkins, Judd(8), Lance, Lazechko(Thornburg), Nafziger, Pomeroy, Reid, Robison, Stennett, Vickers, Wright.
Absent and excused -- Mortensen(Mortensen).
Title apvd - to Senate
03/11 Senate intro - 1st rdg - to Res/Env

H346.....By Resources & Conservation

--Continued--

EASEMENTS - SUBMERGED LANDS - Adds to existing law to provide prescriptive easements for submerged lands and to provide for a limitation of actions against dam owners.

02/28 House intro - 1st rdg - to printing
03/01 Rpt prt - to Res/Con
03/08 Rpt out - rec d/p - to 2nd rdg
03/11 2nd rdg - to 3rd rdg
03/13 3rd rdg - PASSED - 47-35-2
NAYS -- Adams, Black(27), Black(23), Chamberlain, Frasure, Gannon, Geddes, Gurnsey, Hansen(20), Hofman, Horvath, Infanger, Jenkins, Judd(8), Judd(3), Kempton, Lance, Lasuen, Loertscher, McEvoy, Montgomery, Mortensen(Mortensen), Nafziger, Reid, Reynolds, Richardson, Robison, Sali, Schaefer, Sessions, Stoiceff, Tippets, Vickers, Wright, Mr. Speaker.
Absent and excused -- Childers(Beck), Wood.
Title apvd - to Senate
03/14 Senate intro - 1st rdg - to Res/Env
03/27 Rpt out - rec d/p - to 2nd rdg
03/28 2nd rdg - to 3rd rdg
Rls susp - PASSED - 31-6-5
NAYS--Bilyeu, Blackbird, Calabretta, Furness, Dennis Hansen, Noh.
Absent and excused--Burkett, John Hansen, Hawkins, McLaughlin, Parry.
Title apvd - to House
03/29 To enrol - rpt enrol - Sp signed
04/02 Pres signed - to Governor
04/04 Governor signed
Session Law Chapter 328
Effective: 07/01/91

H347.....By Appropriations
APPROPRIATIONS - An act appropriating moneys for fiscal year 1992 to the Attorney General for state legal services, and appropriating additional moneys for fiscal year 1991.

02/28 House intro - 1st rdg - to printing
03/01 Rpt prt
03/08 1st rdg - to 2nd rdg
03/11 2nd rdg - to 3rd rdg
03/12 Ret to Approp
03/15 Rpt out - w/o rec - to 3rd rdg
03/18 3rd rdg - PASSED - 76-6-2
NAYS -- Crow, Geddes, McEvoy, Sali, Schaefer, Taylor.
Absent and excused -- Frasure, Hansen(20).
Title apvd - to Senate
03/19 Senate intro - 1st rdg - to Fin
03/20 Rpt out - rec d/p - to 2nd rdg
03/21 2nd rdg - to 3rd rdg
03/22 3rd rdg - PASSED - 29-9-4
NAYS--Crapo, Darrington, Dennis Hansen, Larsen, Parry, Ricks, Staker, Tominaga, Vance.
Absent and excused--Burkett, Furness, Hawkins, Thorne.
Title apvd - to House
03/25 To enrol
Rpt enrol - Sp signed
03/26 Pres signed - to Governor
03/29 Governor signed
Session Law Chapter 180
Effective: Section 6 - 03/29/91
All others - 07/01/91

H348.....By Revenue & Taxation
TAX AND TAXATION - BUDGET REQUESTS - Amends existing law to clarify the budget request process for highway districts and county highway systems.

02/28 House intro - 1st rdg - to printing
03/01 Rpt prt - to Rev/Tax
03/13 Rpt out - rec d/p - to 2nd rdg

03/14 2nd rdg - to 3rd rdg
03/20 3rd rdg - PASSED - 58-21-5
NAYS -- Barnes, Black(23), Chamberlain, Crane, Crow, Cannon, Jenkins, Judd(3), Lance, Linford, Mahoney, McEvoy, Montgomery, Mortensen(Mortensen), Pomeroy, Sali, Schaefer, Vandenberg, White, Wood, Wright.
Absent and excused -- Childers, Gould, Horvath, Lasuen, Parks.
Title apvd - to Senate
03/21 Senate intro - 1st rdg - to Loc Gov

H349.....By Revenue & Taxation
CEMETERIES - Amends existing law to authorize counties to grant or gift cemeteries within the county to cemetery maintenance districts.

02/28 House intro - 1st rdg - to printing
03/01 Rpt prt - to Rev/Tax
03/05 Rpt out - rec d/p - to 2nd rdg
03/06 2nd rdg - to 3rd rdg
03/11 3rd rdg - PASSED - 79-0-4*
NAYS -- None.
Absent and excused -- Black(27), Richardson, Sorensen, Wood.
Title apvd - to Senate
03/12 Senate intro - 1st rdg - to Loc Gov
03/20 Rpt out - to 14th Ord

H350.....By State Affairs
PUBLIC EMPLOYEES RETIREMENT SYSTEM - UNUSED SICK LEAVE - Amends existing law to provide that college and university faculty and staff who are participants in state optional retirement programs may upon retirement receive credit for unused sick leave toward health, accident and life insurance.

03/01 House intro - 1st rdg - to printing
03/04 Rpt prt - to St Aff
03/06 Rpt out - rec d/p - to 2nd rdg
03/07 2nd rdg - to 3rd rdg
03/11 3rd rdg - PASSED - 77-1-5*
NAYS -- Tilman.
Absent and excused -- Jones(10), Loveland, Lucas, Richardson, Wood.
Title apvd - to Senate
03/12 Senate intro - 1st rdg - to Human Res
03/15 Rpt out - rec d/p - to 2nd rdg
03/18 2nd rdg - to 3rd rdg
03/23 3rd rdg - PASSED - 42-0-0
NAYS--None.
Absent and excused--None.
Title apvd - to House
03/25 To enrol
Rpt enrol - Sp signed
03/26 Pres signed - to Governor
03/29 Governor signed
Session Law Chapter 181
Effective: 07/01/90

H351.....By Education
TAX AND TAXATION - CARBONATED BEVERAGE TAX - Adds to and amends existing law to provide for a tax on carbonated beverages and syrups to be utilized for community college purposes.

03/01 House intro - 1st rdg - to printing
03/04 Rpt prt - to Rev/Tax

H352.....By Environmental Affairs
SOLID WASTE - TIRES - Adds to existing law to provide for the regulation and disposal of waste tires.

portions of Section 15, Article 3, of the Constitution of the State of Idaho requiring all bills to be read on three several days be dispensed with, this being a case of urgency, and that H 346 be read the third time at length, section by section, and be put upon its final passage.

The question being, "Shall the rules be suspended?"

Roll call resulted as follows:

AYES-Beitelspacher, Benson, Bilyeu, Blackbird, Brooks, Carlson, Crapo, Darrington, Davis, Donesley, Furness, Dennis Hansen, Hartung, Haun, Hawkins, Kerrick, Larsen, Lloyd, McDermott, McRoberts, Newcomb, Noh, Osborne, Peavey, Reed, Reents, Ricks, Scanlin, Snodgrass, Staker, Sweeney, Thorne, Tominaga, Tucker, Twiggs, Vance, Wetherell. Total - 37.

NAYS-Calabretta. Total - 1.

Absent and excused-Burkett, John Hansen, McLaughlin, Parry. Total - 4.

Total - 42.

More than two-thirds having voted in the affirmative, the President declared the rules suspended.

H 346 was read the third time at length, section by section, and placed before the Senate for final consideration. Senators Tominaga and Donesley arose as cosponsors of the bill and opened the debate. The question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES-Beitelspacher, Benson, Brooks, Carlson, Crapo, Darrington, Davis, Donesley, Hartung, Haun, Kerrick, Larsen, Lloyd, McDermott, McRoberts, Newcomb, Osborne, Peavey, Reed, Reents, Ricks, Scanlin, Snodgrass, Staker, Sweeney, Thorne, Tominaga, Tucker, Twiggs, Vance, Wetherell. Total - 31.

NAYS-Bilyeu, Blackbird, Calabretta, Furness, Dennis Hansen, Noh. Total - 6.

Absent and excused-Burkett, John Hansen, Hawkins, McLaughlin, Parry. Total - 5.

Total - 42.

Whereupon the President declared H 346 passed, title was approved, and the bill ordered returned to the House.

On request by Senator Donesley, granted by unanimous consent, the following Statement of Legislative Intent was ordered spread upon the pages of the Journal:

LEGISLATIVE INTENT OF H 346

The purpose of H 346 is to clarify the right of dam operators to obtain prescriptive overflow easements. H 346 should not be construed in any way to determine the location of the natural or ordinary high water mark of any navigable waters within the state.

It is further the intent of the Legislature that H 346 does not apply to lands owned by the State of Idaho.

Motion to Suspend Rules

Moved by Senator Twiggs, seconded by Senator Sweeney, that all rules of the Senate interfering with the immediate passage of H 263 be suspended; that the portions of Section 15, Article 3, of the Constitution of the State of Idaho requiring all bills to be read on three several days be dispensed with, this being a case of urgency, and that H 263 be read the third time at length, section by section, and be put upon its final passage.

The question being, "Shall the rules be suspended?"

Roll call resulted as follows:

AYES-Beitelspacher, Benson, Bilyeu, Blackbird, Brooks, Calabretta, Carlson, Crapo, Darrington, Davis, Donesley, Furness, Dennis Hansen, Hartung, Haun, Hawkins, Kerrick, Larsen, Lloyd, McDermott, McRoberts, Newcomb, Noh, Osborne, Peavey, Reents, Ricks, Scanlin, Snodgrass, Staker, Sweeney, Thorne, Tominaga, Tucker, Twiggs, Vance, Wetherell. Total - 37.

NAYS-Reed. Total - 1.

Absent and excused-Burkett, John Hansen, McLaughlin, Parry. Total - 4.

Total - 42.

More than two-thirds having voted in the affirmative, the President declared the rules suspended.

H 263 was read the third time at length, section by section, and placed before the Senate for final consideration. Senator Furness arose as sponsor of the bill and opened the debate. The question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES-Beitelspacher, Blackbird, Carlson, Crapo, Darrington, Furness, Dennis Hansen, Hartung, Kerrick, Larsen, Lloyd, McRoberts, Newcomb, Noh, Osborne, Peavey, Reents, Ricks, Snodgrass, Thorne, Tominaga, Tucker, Twiggs, Vance, Wetherell. Total - 25.

NAYS-Benson, Bilyeu, Brooks, Calabretta, Davis, Donesley, Haun, McDermott, Reed, Scanlin. Total - 10.

Absent and excused-Burkett, John Hansen, Hawkins, McLaughlin, Parry, Staker, Sweeney. Total - 7.

Total - 42.

Whereupon the President declared H 263 passed, title was approved, and the bill ordered returned to the House.

Motion to Suspend Rules

Moved by Senator Twiggs, seconded by Senator Peavey, that all rules of the Senate interfering with the immediate passage of H 246, as amended, be suspended; that the portions of Section 15, Article 3, of the Constitution of the State of Idaho requiring all bills to be read on three several days be dispensed with, this being a case of urgency, and that H 246, as amended, be read the third time at length, section by section, and be put upon its final passage.

STATEMENT OF PURPOSE

RS 00293

This legislation provides dam owners clear authority to acquire prescriptive overflow easements after five (5) consecutive years of overflow, similar to other such easements. The legislation also provides one (1) year for property owners to initiate actions related to overflow of lands by dam operations occurring in the past five (5) years. Certain private and state property rights and overflow easements previously acquired under common law are protected by the legislation, and such easements are not subject to forfeiture because water is not available.

FISCAL NOTE

None.

STATEMENT OF PURPOSE/FISCAL NOTE

(1991)

H 346

HOUSE RESOURCES AND CONSERVATION COMMITTEE

DATE: February 27, 1991
TIME: 2:30 PM
PLACE: Room 412
PRESENT: All committee members were present except:
ABSENT/
EXCUSED: Rep. Sutton

Rep. Mahoney moved that the minutes from the February 21, 1991 meeting be approved as printed; Rep. Decelle seconded the motion. Motion carried.

RS 00283 Irrigation District Elections

Rep. Loosli sponsored this RS which clarifies who can vote in water district elections. Last year in eastern Idaho, any landowner could vote in the water district election. This legislation would require that owners of water district stock that have been paying operation and maintenance assessments on the stock are the only people eligible to vote in elections.

Rep. Johnson moved to introduce RS 00283 for printing; Rep. Hansen seconded the motion. During further discussion, Rep. Jones(29) called for question. Motion carried.

RS 00293 Limitations of Actions; to Provide for Prescriptive Easements for Dam Operations.

Neil Colwell, Washington Water Power, presented this RS that replaces H 257. It contains three changes from the original bill. The sentence starting in Line 23, Page 1 protects dam owners from forfeiting their easement if they fail to exercise it because of lack of water. Page 1, Lines 38 and 39 state that nothing in this legislation would affect a previously acquired easement, and Line 42, Page 1 defines the high water mark.

Rep. Stoicheff moved to introduce RS 00293 for printing; Rep. Johnson seconded the motion. Motion carried.

Rep. Newcomb moved to hold H 257 in committee; Rep. Jones(23) seconded the motion. Motion carried.

H 262 Regulatory Takings.

Rep. Newcomb introduced this bill which will prevent unbeknownst takings of private property. It requires government agencies to provide a Constitutional Impact Assessment as required by the Attorney General.

Rayola Jacobsen, Farm Bureau, testified in favor of the bill. Private property rights are the basis for all economic rights. If this becomes state law, it would affect state agencies.

Jama Yost, Student, stated that when a farmer sells a product, its value increases through various taxes and other means as it goes through the channels to get to the final product. Therefore, if the government purchases private property those value increases do not exist and the wealth of the nation decreases. This bill would provide an orderly process to evaluate government takings.

Stan Boyd, Lobbyist, Idaho Woolgrowers Assoc. and Idaho Cattle Assoc. testified that this bill would establish an orderly and consistent process and won't change what is already available to the public. It will make state agencies aware of how they infringe on private rights.

RESOURCES AND CONSERVATION COMMITTEE

DATE: March 1, 1991

TIME: 2:30 PM

PLACE: Room 412

PRESENT: All committee members were present except:

ABSENT/

EXCUSED: Rep. Hansen, Rep. Lucas, Rep. Newcomb, Rep. Mahoney and Rep. Sutton.

Rep. Jones(29) moved to approve the minutes of the February 27, 1991 meeting as printed; Rep. Linford seconded the motion. Motion carried.

Marilyn Sweeney sat in for Rep. Vickers and Dane Watkins sat in for Rep. Steele.

H 346 Limitations of Actions; to Provide for Prescriptive Easements for Dam Operations.

Neil Colwell, Washington Water Power, presented this bill which allows dam owners to acquire prescriptive overflow easements. These easements would apply to operations that they have consistently done over time. Washington Water Power will provide two forms of notice-direct mail notification and three notices in newspapers' news of record.

Martin Weber, attorney representing Dolly Hartman, a landowner on Lake Coeur d'Alene, testified against the bill. On line 18, the opening sentence containing the words "deemed to have obtained" makes property owners seek damages. The "part of a year" wording in the bill is not defined. A dam owner could raise the level of water for two days a year and have the right to a prescriptive overflow easement. Mr. Colwell stated that if the water level was raised for two days, the easement would be granted for only two days at that height. Mr. Weber stated that this bill would also involve wetlands and the problems associated with them.

Sherl Chapman stated that the Water Users Association helped input the changes in this bill, and verified that they have no problem with this legislation.

Cy Chase, former State Senator, testified against the bill. He stated that Washington Water Power is not giving us all of the facts and is trying to slip this legislation through. There are a lot of people in the Coeur d'Alene area that have been flooded and can't afford to pursue litigation against WWP. Mr. Chase stated that there should be a hearing in North Idaho where the people are affected, and a lot of them don't even know about this legislation. The supporters of this bill are summer residents, not landowners who live there year round.

Jim Yost, Farm Bureau, stated that his organization opposes the bill. They struggled with the legislation for a couple of weeks, and their problem with it is that there is no established high water mark. The high water mark is somewhere between 2,121 feet and 2,128 feet. When there is runoff, the water goes over banks and floods. It can't be filled in, because it's considered a wetland.

Rep. Linford feels that the committee is being asked to referee a problem, and they don't have enough information to make a sound decision. Therefore, he moved to hold H 346 in committee; Rep. Robison seconded the motion.

Rep. Bell made a substitute motion to hold the bill for time certain, Tuesday, March 5th, since the sponsor of the bill, Rep. Newcomb, was absent from the meeting; Rep. Jones(29) seconded the motion. Motion carried.

HOUSE RESOURCES & CONSERVATION COMMITTEE

3/5/91

Janet Crepps, Idaho ACLU, testified in favor of the bill. It would provide greater protection of citizens' due process rights. Her organization feels that the bill would result in policies that are less likely to be challenged after they are formulated.

Bob Gates, Deputy A.G. with the Department of Corrections, testified against the bill. He feels that the terms and definitions contained in the bill are broad and vague. His department's main concern is that the language in the bill applies to liberty interests and could affect the property rights of prisoners. If this bill is passed, the Department of Corrections would have to hire a fourth attorney and another secretary to process the legislation and CIA's.

Brad Hall, Deputy A.G. with the Office of the State Board of Education, testified against the bill. If a student is suspended or expelled, he has the right to due process. This would raise CIA problems.

Stan Boyd represented the livestock industry in support of H 262. The purpose of this legislation is not to increase the number of court cases, but to decrease them. The bill provides that guidelines be reviewed by the attorney general on an annual basis. A lot of people will allow a taking to occur because of lack of time and money.

Jim Little, Emmett Rancher, testified in favor of the bill. He stated that more and more things are coming at us from all agencies, and someone needs to stand up for private property owners.

Rep. Newcomb acknowledged that there are some legitimate concerns, but feels that most of them are ghosts. He stated that philosophically this is as good a bill as can be put together under the circumstances and wonders what is wrong with a bill that protects people's rights.

Rep. Bell moved to send H 262 to the House floor with a "Do Pass" recommendation; Rep. Jones(29) seconded the motion.

Rep. Vickers made a substitute motion to hold H 262 in committee; Rep. Robison seconded the motion. Rep. Vickers stated that as drafted this bill raises a lot of legitimate questions. Government agencies are being addressed as the enemies in jest, but she feels that there is an underlying seriousness to the issue. The agencies represent us, so an effort should be made to pass legislation that will foster better relations with them.

Rep. Jones(29) feels that 80% of the voting public would vote for this bill; since the members of the committee represent them, they should vote for it. He made an amended substitute motion to hold the bill in committee until Thursday, March 7th, so members who are absent can vote. Rep. Steele seconded the motion. A roll call vote was taken with 13 AYES, 4 NAYS and 3 absent and excused. Motion passed.

Voting aye: Wood, Hansen, Field, Newcomb, Steele, Bell, Steger, Decelle, Gannon, Jones(29), White, Johnson and Stoicheff.
Voting nay: Lucas, Jones(23), Vickers and Robison.

→ H 346 Limitations of Actions; to Provide for Prescriptive Easements for Dam Operations.

Neil Colwell, Washington Water Power, stated that the high water mark on the Coeur d'Alene drainage is not defined, and WWP is trying to acquire by law the right they have exercised since 1942. This bill will not affect the riparian rights of property owners.

Rep. Stoicheff stated that Jim Yost, Farm Bureau, testified in opposition to the bill at the last meeting, and he has received some mail in the last couple of days from people who oppose the bill. Therefore, he asked unanimous consent to hold the bill in committee until Thursday, March 7th. Unanimous consent was granted.

HOUSE RESOURCES AND CONSERVATION COMMITTEE

DATE: March 7, 1991
TIME: 3:00 PM
PLACE: Room 412
PRESENT: All committee members were present except:
ABSENT/
EXCUSED: Rep. Steele and Rep. Jones(23).

Rep. Linford moved that the minutes from the Payette River Plan hearing be approved as printed; Rep. Hansen seconded the motion. Motion carried.

Rep. Hansen moved that the minutes from the March 5, 1991 meeting be approved as printed; Rep. Linford seconded the motion. Motion carried.

H 346 Relating to Limitations of Actions; Prescriptive Easements for Dam Operations.

Rep. Newcomb stated that both the Lake Coeur d'Alene property owners and Washington Water Power endorsed this bill. The bill has nothing to do with determining property lines, that is between the state and private property owners.

Rep. Jones(29) moved to send H 346 to the House floor with a "Do Pass" recommendation; Rep. Newcomb seconded the motion. A roll call vote was taken with 14 AYES, 4 NAYS and 2 absent and excused. Motion carried.

Voting aye: Hansen, Linford, Lucas, Field, Newcomb, Mahoney, Bell, Steger, Loosli, Decelle, Jones(29), White, Vickers and Johnson.
Voting nay: Wood, Gannon, Robison and Stoicheff.

H 319 Water Quality Management of Priest Lake.

Rep. Stoicheff stated that this bill will set up a three year management plan for Priest Lake. People have lived up there since 1890, taken care of the lake and still manage to make a living, and they want that quality of life to continue. To the best of his knowledge, there is no opposition to the bill. The Priest Lake, Priest River and Sandpoint Chambers of Commerce support the bill as does the Department of Agriculture and state lessees.

Al Murray, Water Quality Bureau, Health and Welfare, explained the fiscal impact of \$295,000. It was based on using contract rates which are higher than staff rates. Therefore, since staff will probably be used to do the studies it is not anticipated that the actual cost will be that high. They are not simple studies; therefore, they are very costly but worthwhile.

Rep. Hansen moved to send H 319 to the House floor with a "Do Pass" recommendation; Rep. White seconded the motion. Motion carried with Rep. Bell voting "No." Rep. Hansen stated that the fiscal note is generally an honest attempt to assess costs. By sending the bill to the floor, it gives JFAC the opportunity to make the decision on the fiscal impact.

A G E N D A

SENATE RESOURCES AND ENVIRONMENT COMMITTEE

12:00 - 1:00 P.M. *
ROOM 433

DATE: MARCH 25, 1991

BILL NO.	DESCRIPTION	SPONSOR
1.	APPROVAL OF MINUTES - March 20, 1991	
2.	S 1140a Fee in Lieu of Taxes	
3.	Rules IDAPA26.61.1 - 20 --- Waterways Improvement Rule Amendments	
	Confirmation of Gubernatorial Appointments	
1.	Outfitters and Guides Leo Crane	
2.	Idaho Water Resources Board Reappointment of Clarence Parr Kenneth Hungerford J. D. Williams New Appointment of Dennis (Mike) Satterwhite	
5.	HB 319 Priest Lake - Water Quality Management Plan Rep. Stoicheff	
6.	HB 263 Sand and Gravel - Exempts from Surface Mining Act if used for highways Rep. Myron Jones	
7.	HB 346 Easements - Submerged lands - Adds to existing law to provide prescriptive easements for submerged lands and to provide for a limitation of actions against dam owners. Rep. Newcomb	
7.4	HB 260 County Vessel Funds: Amends IC 67-7013 to provide for remittance of excessive fund balance to general account Rep. Wally Wright	

NOTE: The Committee will meet from 12:00PM to 1:00PM
(During the lunch hour)

SUBSTITUTE MOTION

Sen. Calabretta moved that HB 263 be held in Committee, seconded by Sen. Reed.

AMENDED SUBSTITUTE MOTION

Sen. Carlson moved that HB 263 be sent out without recommendation, seconded by Sen. Hawkins.

Discussion followed about two-acre impacts that may arise in critical riparian and highway areas.

ROLLCALL - AMENDED SUBSTITUTE MOTION

6-6 Ayes: Senators Beitelspacher, Burkett, Calabretta, Donesley, Peavey, Reed

Nays: Senators Carlson, Furness, Hansen, Hawkins, Noh, Tominaga

ROLLCALL - ORIGINAL MOTION TO SEND TO FLOOR

6-6 Ayes: Senators Carlson, Furness, Hansen, Hawkins, Noh, Tominaga

Nays: Senators Beitelspacher, Burkett, Calabretta, Donesley, Peavey, Reed

UNANIMOUS CONSENT

After discussion, Senators Beitelspacher and Donesley asked that HB 263 be held in Committee until a time certain to allow for sponsor participation, to which the Committee agreed.

* * *

HB 346 Easements - Submerged Lands - Adds to existing law to provide prescriptive easements for submerged lands and to provide for a limitation of actions against dam owners.

Neil Colwell, Washington Water Power, stated the intent of HB 346 is to limit an owner's ability to seek relief through litigation and that basically the legislation would give the dam owner the same rights as irrigators and land owners, that is, if litigation is not commenced within a certain period, legal action and recovery would be precluded. An amendment has been prepared and Mr. Colwell requested that the Committee send HB 346 forward to the Fourteenth Order.

Due to the lack of additional time, the meeting adjourned at 1:10pm.


Laird Noh, Chairman


Ruth Grasser, Secretary

March 25, 1991

The meeting was held on March 25, 1991, at the home of Ruth Grasser. The meeting was held at 7:00 PM. The meeting was held at 7:00 PM. The meeting was held at 7:00 PM.

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Cecil H. Andrew
1991

AGENDA

SENATE RESOURCES AND ENVIRONMENT COMMITTEE

12:00 - 1:00 P.M. *
ROOM 433

DATE: MARCH 26, 1991

BILL NO.	DESCRIPTION	SPONSOR
HB 346	Easements - Submerged Lands - Adds to existing law to provide prescriptive easements for submerged lands and to provide for a limitation of actions against dam owners.	Rep Newcomb
HB 263	Sand and Gravel - Exempts from Surface Mining Act if used for highways	Rep. Myron Jones
HB 260	County Vessel Funds: Amends IC 67-7013 to provide for remittance of excessive fund balance to general account	Rep. Wally Wright
HB25aa	Relating to Sale and Purchase of Wildlife (Amending Section 36-501) To provide that the sale of wildlife legally raised or harvested commercially by properly licensed commercial operations is lawful unless prohibited by commission regulation.	Fish and Game
HJM 6	Memorial opposing the reintroduction of Wolves into Yellowstone National Park and the Central Idaho Wilderness Area	Idaho Farm Bureau
NOTE:	The Committee will meet from 12:00PM to 1:00PM (During the lunch hour)	

MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

DATE: March 26, 1991
TIME: 12:00M
PLACE: Room 433
PRESENT: Chairman Noh, Senators Carlson, Tominaga,
Hansen, Furness, Hawkins, Beitelspacher,
Peavey, Calabretta, Reed, Donesley, Burkett
ABSENT/EXCLUDED: None

The Chairman called the meeting to order at 12:20pm.

HB 263 Sand and Gravel - exempts from Surface Mining Act if used for highways

Rep. Myron Jones informed Committee members that gravel donated to the Department of Transportation or highway departments by landowners of two acres or less is not subject to reclamation requirements. The gravel is used for road maintenance and repairs in the immediate vicinity. Any gravel removed and sold from an area of two acres or more is subject to requirements of the Surface Mining Act.

MOTION

Sen. Carlson moved that HB 263 be sent to the Floor with a Do Pass recommendation, seconded by Sen. Hansen. After a voice vote, the motion carried.

x x x

HB 346 Easements - Submerged lands - Adds to existing law to provide prescriptive easements for submerged lands and to provide for a limitation of actions against dam owners.

Sen. Calabretta reported that she had received a petition from Mrs. Dolly Hartman and Mr. Cy Chase, constituents in St. Maries, Idaho, requesting that a Public Hearing be held before considering the bill. Copies of pertinent correspondence are attached hereto and included as a permanent part of these minutes.

Minutes - 1
March 26, 1991

Mr. Chase, a former state senator, informed the Committee of his experience and participation in the drainage district. Mr. Chase further reviewed the Settlement Agreement prepared by Washington Water Power Company for the Benewah County Drainage District No. 5. He asked the Committee to consider holding the bill for a year to allow for additional consideration and negotiated settlements.

Discussion followed about the intent of the legislation and the potential dollar liability that WWP is attempting to avoid.

Ron Rankin, President of the Kootenai County Property Owners Association, addressed the Committee. Mr. Rankin stated the bottom line is that by removing the potential for litigation it is also removing the incentive to negotiate. Once the bill is in effect, WWP's incentive to negotiate in good faith is gone.

Mr. Rankin stated his association is concerned that legislation affecting only two legislative districts in the far north has been introduced by a legislator from a county located 500 miles down south near Utah and Nevada. According to Mr. Rankin, the perceptions are that the political action committee of a utility has spent thousands of dollars in donations which puts other legislators at a decided disadvantage when introducing legislation. Mr. Rankin referred to a recent mailing made by his association depicting amounts contributed to legislators.

Discussion followed about the impacts of lowering the lake level, assumptions of easements and entitlement to damages and whether WWP is being held captive in order to advance negotiations for settlement when a reasonable judicial remedy is readily available.

Sen. Carlson asked to be on record stating that the propaganda mailed out by Mr. Rankin attempts to create the perception that there are twelve carpetbaggers sitting there attempting to sell their votes. Mr. Rankin should be aware that all Senators carry legislation that has nothing to do with the areas in which they reside--almost every bill carried by Sen. Carlson had nothing to do with the area in which he lives. Sen. Carlson again stated that Mr. Rankin should be aware of that.

Jim Yost, Idaho Farm Bureau, addressed the Committee. The problem the Farm Bureau has with the legislation is there are three groups of people which have an interest in the outcome of the legislation: (1) one group wants to own the property down to the 2121 foot level; (2) another group along the river only wants to resolve and settle the issue and (3) the third group wants a delay.

Sen. Reed introduced a letter from Will Whelan, Deputy Attorney General, which is attached hereto and made a permanent part of the minutes, which indicates that the bill will not effect determination of the legal lake level.

Minutes - 2
March 26, 1991

Fred Kisabeth, Department of Lands, addressed the Committee, and a statement prepared by Mr. Kisabeth is attached hereto and made a permanent part of these minutes. Mr. Kisabeth related that departmental analysis of the legislation was directed to the affect on state-owned lands. It is their understanding that HB 346 was not intended to apply to all lands owned by the State of Idaho. He believes the bill should be amended.

Mr. Whelan, attorney for the Department of Lands, said the rule that state lands could not be adversely possessed stems from the common law and the statement of legislative intent would be appropriate where the bill was ambiguous. Perhaps the bill is not ambiguous enough, even to be corrected by a statement of legislative intent, because it applies to all real property owned by the state.

Neil Colwell, WWP, briefly addressed the committee; the comments of Mr. Yost; the elevation level of the lake, some settlements achieved by WWP after a lengthy period--if the elevation of the lake exceeds 2128 feet, WWP is required to let the water out; the bill basically puts a time limit on suits to be brought; this has been going on since 1942 and WWP has been a party to settlements and lawsuits and foresees that continuing without the legislation. Mr. Colwell sees no reason the legislation cannot be passed this session.

MOTION

Sen. Donesley moved that HB 346 be sent to the Floor to the Second Reading with a statement of legislative intent, prepared by the Office of the Attorney General, indicating that it is the intent of the Legislature not to affect state lands by prescriptive easement by any effect of this House Bill, seconded by Senator Tominaga.

SUBSTITUTE MOTION

Sen. Calabretta moved that HB 346 be held in Committee.
The Motion died for lack of a second.

SUBSTITUTE MOTION

Sen. Hawkins moved that HB 346 be sent to the Fourteenth Order to put in a delayed implementation date, seconded by Sen. Calabretta.

ROLLCALL VOTE - SUBSTITUTE MOTION (Fourteenth Order)

5-7 Ayes: Senators Calabretta, Furness, Hawkins, Noh, Reed

Nays: Senators Beitelspacher, Burkett, Carlson, Donesley,
Hansen, Peavey, Tominaga

The Motion failed for lack of a majority.

ROLLCALL VOTE - ORIGINAL MOTION (Send to Floor with
Statement of Legislative Intent)


8-4 Ayes: Senators Beitelspacher, Burkett, Carlson, Donesley,
Hansen, Peavey, Reed, Tominaga

Nays: Senators Calabretta, Furness, Hawkins, Noh

The Motion carried. Sen. Tominaga will Sponsor.

Due to time limitations, the Committee adjourned at 1:15pm.


Ruth Grasser, Secretary


Laird Noh, Chairman

Idaho Department of Lands' Statement on H.B. 346
Presented March 26, 1991
by Fred A. Kisabeth, Assistant Director, Lands, Minerals & Range

The Idaho Department of Lands comes before you today to express concern over House Bill 346.

It has come to our attention, through consultation with our attorneys and the AG's office that House Bill 346 as written raises a constitutional question with respect to adverse possession of endowment lands as well as potential legal issues with respect to all other state lands.

It is my understanding that the declaration of legislative intent was to include a paragraph indicating that House Bill 346 was not intended to apply to lands owned by the State of Idaho, however, the state's attorneys feel that such a statement will not adequately protect state lands. The unambiguous language embodied in the bill purports to create a prescriptive easement over real property in this state without regard to state ownership of land above the natural or ordinary high watermark. The usefulness of a statement of legislative intent in any future litigation is therefore called into question.

For this reason and because of the potential legal ramifications, the Department is not willing to rely on the use of the statement of legislative intent alone. Instead the Department suggests that House Bill 346 be amended to include

specific language excluding all lands owned by the State of Idaho.

The Department of Lands proposes the following amendment to the last sentence of 5-246:

The provisions of this section shall not be construed to apply to the beds of navigable waters lying below the natural or ordinary high watermark as defined in subsection (9) of section 58-104, Idaho Code, or any other lands owned by the State of Idaho.



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720-1000

LARRY ECHOHAWK
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

TELECOPIER
(208) 334-2530

NATURAL RESOURCES
TELECOPIER
(208) 334-2690

March 26, 1991

The Honorable Denny Davis
The Honorable Freeman Duncan
Idaho State Legislature
Boise, Idaho 83720

Dear Senator Davis and Representative Duncan:

Thank you for your letter of March 25, 1991, which raises three questions regarding H346.

Your first question asks whether H346 can be construed in a way that would determine the location of the natural or ordinary high water mark (OHWM) of Coeur d'Alene Lake. The bill deals solely with the right of dam operators to obtain nonexclusive prescriptive overflow easements and does not determine the location of the OHWM of any navigable water in Idaho. It is our understanding that H346 is not intended to affect the ownership of the bed and banks of Coeur d'Alene Lake.

Your second question asks whether there is any legal significance in the fact that H346 refers to the definition of "natural or ordinary high water mark" in Idaho Code § 58-104(9) but does not reference the definition of the same term in Idaho Code § 58-1302(c). The relevant provision in H346 provides that a dam operator cannot obtain a prescriptive easement to the beds of navigable water below the OHWM as defined in Idaho Code § 58-104(9). The provision determines only the geographic scope of the prescriptive easements that may be gained under H346 and does not define OHWM for purposes of determining title to the bed or banks of navigable waters. Thus, the omission of a reference to Idaho Code § 58-1302(c) is not legally significant in determining ownership of the bed of Lake Coeur d'Alene.

The Honorable Denny Davis
The Honorable Freeman Duncan
March 26, 1991
Page 2

Your third question asks whether the passage of H346 would preclude the use of the definition of OHWM in Idaho Code § 58-1302(c) in future litigation regarding ownership of the bed of Lake Coeur d'Alene. The Office of the Attorney General does not comment on ongoing or threatened litigation. In a general context, however, my opinion is that the passage of H346 would not by itself preclude the use of Idaho Code § 58-1302(c) in litigation if that definition is otherwise appropriately considered.

I have not had an opportunity to review the questions fully due to the short time for response to your letter. Therefore, my answers should be regarded as preliminary.

Sincerely,



William S. Whelan
Deputy Attorney General

WSW/cjc

UN HB346 TO P A PUBLIC MEETING
here, at y convenience
in the Interim. Thanks for listening.

March 25, 1991
Route 2--Box 116
St. Maries, Idaho 83861

MEMBERS OF THE SENATE RESOURCES & ENVIRONMENT COMMITTEE
SENATOR LAIRD NOH, CHAIRMAN AND SENATOR HERB CARLSON, V-CHAIRMAN
LADIES AND GENTLEMEN:

It is my understanding HB346 may be considered today. Many Legislators live near or are dependent upon Irrigation Dams for livelihood where the real concern is enough water to flow over the land for irrigation purposes. (I know, having grown up on the Vale-Owyhee Irrigation project in Eastern Oregon). Co-exisiting with the PRIMARY NEED for water for agricultural crops including livestock may be the creation of hydro-electric power and the many recreation opportunities associated with WATER, i.e. THE IMPACT OF TOO LITTLE WATER FOR THOSE FOLKS LIVING BELOW THE DAM! Irrigation Districts are formed to deal with the impact of too little water and distribution of it.

Here in North Idaho, the Post Falls Dam which is operated by Washington Water Power Co. of Spokane, PRIMARILY PRODUCES HYDRO-ELECTRIC POWER AND WATER RECREATION IS A VALUABLE BY-PRODUCT OF THEIR MAJOR PRODUCT, WHICH IS ELECTRICITY. WWP HAS BEEN HOODING THE WATER LEVEL OF LAKE COEUR D'ALENE AT 2128' as the Summer level for years. HB 346 does not affect that level. It would be needed however increase their overflow water storage. Many docks, recreational developments are built with the expectation of a summer level of 2128'.

DRAINAGE DISTRICTS HAVE BEEN FORMED TO COPE WITH THE IMPACT OF TOO MUCH WATER FOR THOSE FOLKS LIVING ABOVE THE DAM. These Dreainage Districts pay for electricity tp pump excess water off their property so they may farm the land which is protected by dikes. An increase in the amount of water WWP could overflow will increase the costs to the Drainage Districts and property protected by dikes.

THEN THERE ARE FOLKS LIKE ME WHOSE PROPERTY LIES OUTSIDE THE PROTECTIVE DIKES. ANY INCREASE IN THE WATER LEVEL OF LAKE COEUR D' ALENE WILL EVEN MORE NEGATIVELY IMPACT 30 acres of my 50 acres.

At the summer level of 2128' which is 7 feet higher than the ordinary high water mark established by a jury several years ago, our cattle swim to the higher ground for grazing (we swim with them on horseback); there has been approximately 15 acres of ARTIFICIAL WETLANDS FORMED. At one time my husband and I planned a recreational development but the real and implied restrictions on Wetlands have largely precluded that option. There would be no Wetlands and hay could be harvested still where now there is swamp.

HB346 places NO LIMITS ON WATER LEVELS, AND YET PROVIDES LEGISLATIVE PROTECTION TO DAM OWNERS SUCH AS WASHINGTON WATER POWER. The \$50,000 (plus) is a small pittance compared to the \$ Value of lands impacted by HB346.

WE MUST HAVE THE OPPORTUNITY TO HEAR AND BE HEARD. AT THIS DATE I KNOW OF NO PLANS FOR A HEARING WHICH COULD GIVE THE FOLKS UP HERE A CHANCE TO BE HEARD.

Dolly Hartman-Lindor
991 Homer-Lindor & Family

MARCH 12, 1991

A PERSONAL PLEA FOR MEMBERS OF THE SENATE RESOURCES & ENVIRONMENT COMMITTEE, SENATORS NOH AND CARLSON, CHAIRMAN AND VICE CHAIRMAN

~~X~~ P.S. - 03/20/91 -- ~~WE~~ URGENTLY REQUEST HB346 be HELD IN COMMITTEE BECAUSE WE IN NORTH IDAHO ARE PRIMARILY AFFECTED BY IT AND THERE IS NOT TIME FOR AN ADEQUATE HEARING. REQUEST HEARING BE HELD HERE, IN THE INTERIM, AFTER
We the undersigned, A POLITICALLY ACTIVE REPUBLICAN AND LEGISLATOR DEMOCRAT, are cosponsoring an effort to give those folks who own waterfront property along the Rivers flowing into Coeur d'Alene Lake equal opportunity TO HEAR AND BE HEARD ABOUT HB 346 (PRESCRIPTIVE OVERFLOW EASEMENTS). c40

Many waterfront owners and other impacted people who cannot afford either a trip to Boise to testify, or legal action against Washington Water Power Co. must be given every chance to be personally involved in the debate over HB346.

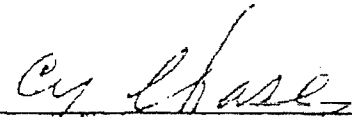
HB 346, if it becomes law, allows the unfair taking of private property from waterfront property owners by allowing Dam Owners such as Washington Waterpower to EASILY OBTAIN PRESCRIPTIVE OVERFLOW EASEMENTS. HB346 is similar to a blank check as it does not define limitations if any, on maximum OVERFLOW levels.

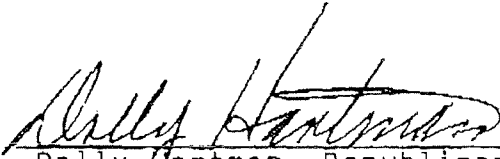
WASHINGTON WATER POWER COMPANY OF SPOKANE, WASHINGTON HAS HELD THE SUMMER LEVEL OF LAKE COEUR D'ALENE AT 2128 ft. above sea level. A JURY IN WALLACE FOUND THE NATURAL HIGH WATER MARK TO BE 2121 ft. above sea level. We know of no effort to reduce the 2128 ft. level which appears to be necessary for many recreational ventures.

HB 346 IS NOT NEEDED FOR WASHINGTON WATER POWER TO HOLD THE WATER LEVEL OF LAKE COEUR D'ALENE AND ITS TRIBUTARIES AT SUMMER LEVEL OF 2128' ABOVE SEA LEVEL WHICH IT HAS DONE FOR MANY YEARS!

ON BEHALF OF WATERFRONT PROPERTY OWNERS AROUND LAKE COEUR D'ALENE AND ITS TRIBUTARIES WE RESPECTFULLY REQUEST HB346 (PRESCRIPTIVE OVERFLOW EASEMENTS) BE HELD IN COMMITTEE UNTIL A PUBLIC HEARING IS HELD IN NORTH IDAHO. (St. Maries, Wallace or Coeur d'Alene.)

Thank You for your consideration,


Cy Chase, Democrat
Chase Chevrolet
St. Maries, Idaho 83861


Dolly Hartman, Republican
Rt. 2 Box 116
St. Maries, Idaho 83861

cc
Sen Marty Calabretta
Rep June Judd
2 attachments (Exhibit #1 & 2)

100

ROLL CALL VOTE

DATE 02/26/91

SUBJECT

H 346 *Prescriptive
Measurements*

BILL #

ORIGINAL MOTIONSUBSTITUTE MOTIONAMENDED SUBSTITUTE MOTION*8-4 Floor**14th Order*

aye nay a/e

aye nay a/e

aye nay a/e

BEITELSPACHER	✓			BEITELSPACHER		✓		BEITELSPACHER			
BURKETT	✓			BURKETT		✓		BURKETT			
CALABRETTA		✓		CALABRETTA	✓			CALABRETTA			
CARLSON	✓			CARLSON		✓		CARLSON			
DONESLEY	✓			DONESLEY		✓		DONESLEY			
FURNESS		✓		FURNESS	✓			FURNESS			
HANSEN	✓			HANSEN		✓		HANSEN			
HAWKINS		✓		HAWKINS	✓			HAWKINS			
NOH		✓		NOH	✓			NOH			
PEAVEY	✓			PEAVEY		✓		PEAVEY			
REED	✓			REED	✓			REED			
TOMINAGA	✓			TOMINAGA		✓		TOMINAGA			

Moved by Sen DonesleyMoved by Sen Hawkins

Moved by _____

Seconded by Sen TominagaSeconded by Sen Calabretta

Seconded by _____

Date

RESOURCES AND ENVIRONMENT COMMITTEE

VISITOR RECORD

[illegible]

WAYS AND MEANS COMMITTEE

MEETING MINUTES

DATE: March 27, 1991

TIME: 8:00 A.M.

PLACE: Republican Caucus Room

PRESENT: Chairman Tominaga, Senators Sweeney, McLaughlin,
Peavey, Hartung, Twiggs

ABSENT/ EXCUSED: Senator McRoberts

GUESTS: Neil Colwell, Washington Water Power
John Hutchison, Idaho Hospital Ass'n

Chairman Tominaga called the meeting to order at 8:10 A.M.

Senator McLaughlin moved and Senator Sweeney seconded that the minutes of March 21, 1991 be approved as written. By a voice vote, the motion carried.

RS00427C1 Prescriptive overflow easement

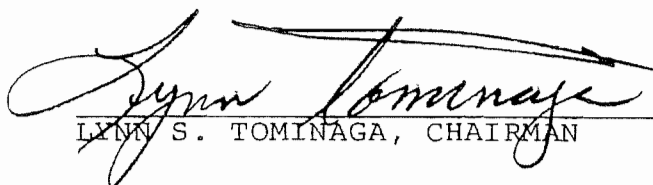
→ Chairman Tominaga introduced the bill, saying that it was similar to HB346, which had some constitutional problems. This RS would resolve those constitutional problems.

MOTION: Moved by Peavey, seconded by Twiggs, that RS00427C1 be sent to the floor with a DO PASS recommendation. Senator Peavey amended the motion further to state that it be sent to the floor and read into the second reading.

This legislation will take care of Northern Idaho's problem in this regard.

By a voice vote the motion was passed unanimously.

Chairman Tominaga adjourned the meeting at 8:15 A.M.


LYNN S. TOMINAGA, CHAIRMAN


LIZ MCWHORTER, SECRETARY

IN THE SENATE

SENATE BILL NO. 1251

BY WAYS AND MEANS COMMITTEE

AN ACT

RELATING TO PRESCRIPTIVE OVERFLOW EASEMENTS; AMENDING SECTION 5-246, IDAHO CODE, AS ENACTED IN HOUSE BILL 346, FIRST REGULAR SESSION, FIFTY-FIRST IDAHO LEGISLATURE, TO ADD A CODE CITATION, AND TO PROTECT CERTAIN STATE PROPERTY RIGHTS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 5-246, as enacted in H.B. No. 346, First Regular Session, Fifty-first Idaho Legislature, be, and the same is hereby amended to read as follows:

5-246. PRESCRIPTIVE OVERFLOW EASEMENTS. In conformity with the limitations of actions time period set forth in sections 5-203 through 5-206, Idaho Code, the owner of a dam shall be deemed to have obtained a nonexclusive prescriptive overflow easement over real property which has been inundated or overflowed by the operations of the dam for at least a part of a year for any consecutive five (5) year period prior to commencement of an action by the property owner seeking relief inconsistent with such nonexclusive prescriptive overflow easement. Said dam owner shall be deemed to have not forfeited said nonexclusive prescriptive overflow easement if the reason for the failure to exercise the easement is a lack of water caused by drought or acts of God.

It is further provided that if a dam has inundated or overflowed real property for at least a part of a year for the five (5) consecutive years prior to the enactment of this section, then the owner of the dam shall be deemed to have obtained a nonexclusive prescriptive overflow easement hereunder over said real property one (1) year after the enactment of this section, provided, no action seeking relief inconsistent with such nonexclusive prescriptive overflow easement has been commenced by the property owner within one (1) year of the enactment of this section. The provisions of this section shall not be construed to affect the riparian and littoral rights of property owners to have access to and use of waters in this state, or to restrict any use of the underlying property for any purpose otherwise consistent with ownership thereof, even if said use interferes with the storage of water on the property. Nothing herein shall be deemed to affect any prescriptive overflow easement that any dam owner may have previously acquired under common law. The provisions of this section shall not be construed to apply to the beds of navigable waters lying below the natural or ordinary high watermark as defined in subsection (c) of section 58-1302, Idaho Code, and subsection (9) of section 58-104, Idaho Code, or any other lands owned by the state of Idaho.

offices of the Department of Parks and Recreation, for building renovations and planning at the institutions of higher education, for planning of renovation of State Hospital North, for the remodel and addition to the University of Idaho library, and for the design of the Capitol Mall Fiber-optic Backbone.

03/22 Senate intro - 1st rdg - to printing
03/23 Rpt prt - to Fin
Rpt out - rec d/p - to 2nd rdg
03/25 2nd rdg - to 3rd rdg
03/27 3rd rdg - PASSED - 40-1-1

NAYS--Peavey.
Absent and excused--Sweeney.
Title apvd - to House

03/28 House intro - 1st rdg - to 2nd rdg
03/29 Rls susp - PASSED - 58-25-1

NAYS -- Beaudoin, Childers(Beck), Crow, Danielson, Davis, Denney, Field, Frasure, Infanger, Judd(3), Lasuen, McEvoy, Mortensen(Mortensen), Newcomb, Sali, Schaefer, Simpson, Steger, Stoicheff, Stone, Stubbs, Tilman, Tippets, Wilde, Wood.
Absent and excused -- Loveland.

Title apvd - to Senate
To enrol - rpt enrol - Pres signed
Sp signed

04/02 To Governor

04/04 Governor signed**

Session Law Chapter 232

Effective: 04/04/91

**Governor Line Item VETOED:

Lines 14, 16, 17 and 18

SI250.....By State Affairs
RULES - ADMINISTRATIVE - An act providing for the continuance of agency rules until July 1, 1992, and authorizing agencies to amend rules pursuant to the Administrative Procedures Act.

03/23 Senate intro - 1st rdg - to printing
03/25 Rpt prt - to St Aff
03/28 Rpt out - rec d/p - to 2nd rdg
03/29 Rls susp - PASSED - 40-0-2

NAYS--None.
Absent and excused--Staker, Sweeney.
Title apvd - to House

03/29 House intro - 1st rdg - to W/H
Rpt out - rec d/p - to 2nd rdg
Rls susp - PASSED - 74-0-10

NAYS -- None.
Absent and excused -- Antone, Childers(Beck), Davis, Gould, Judd(8), Kempton, Loosli, Loveland, Taylor, Vandenberg.

Title apvd - to Senate
To enrol - rpt enrol - Pres signed

04/01 Sp signed

04/02 To Governor

04/04 Governor signed

Session Law Chapter 264

Effective: 07/01/91

SI251.....By Ways & Means
EASEMENTS - SUBMERGED LANDS - Amends existing law as enacted in this session of the Legislature relating to prescriptive easements for submerged lands and limitation of actions against dam owners to include a code citation and to provide for the protection of certain state property rights.

03/27 Senate intro - 1st rdg - to printing
03/28 Rpt print - to W/H

Rpt out - rec d/p - to 2nd rdg

03/29 Rls susp - PASSED - 34-3-5

NAYS--Furness, Newcomb, Noh.

Absent and excused--Bilyeu, Calabretta, John Hansen,

Hawkins, Parry.

Title apvd - to House

03/29 House intro - 1st rdg - to W/H

Rpt out - rec d/p - to 2nd rdg

Rls susp - PASSED - 66-10-8

NAYS -- Chamberlain, Jenkins, Judd(3), Lance Loertscher, McEvoy, Robison, Sali, Vickers, Wright.
Absent and excused -- Antone, Childers(Beck), Davis Kempton, Loosli, Loveland, Taylor, Vandenberg.

Title apvd - to Senate

To enrol - rpt enrol - Pres signed

04/01 Sp signed

04/02 To Governor

04/04 Governor signed

Session Law Chapter 267

Effective: 07/01/91

SI252.....By Ways & Means
APPROPRIATIONS - An act appropriating moneys to the Department of Health and Welfare for fiscal year 1992 for the Point Source Pollution and Radioactive Materials Licensure Programs.

03/28 Senate intro - 1st rdg - to printing
Rpt prt

03/29 Rls susp - PASSED - 40-0-2

NAYS--None.

Absent and excused--Dennis Hansen, Larsen.

Title apvd - to House

House intro - 1st rdg - to W/H

Rpt out - rec d/p - to 2nd rdg

SI253.....By Ways & Means
APPROPRIATIONS - An act appropriating moneys to the Department of Water Resources for the Wood River Hydrologic Study.

03/28 Senate intro - 1st rdg - to printing

03/29 Rpt prt

Rls susp - PASSED - 40-0-2

NAYS--None.

Absent and excused--Dennis Hansen, Larsen.

Title apvd - to House

03/29 House intro - 1st rdg - to W/H

* NOTE: House roll calls for bills listed from 3/5/9 through 3/12/91 reflect a total of 83 members due to vacancy in Legislative District 10.

--Continued--

1991 DAILY DATA FINAL
105

RS00427C1

STATEMENT OF PURPOSE

The purpose of the legislation is to include an additional cite to the Idaho Code concerning the definition of the natural or ordinary high water mark. Further, to clarify that a prescriptive overflow easement cannot be obtained over state owned property.

AGENDA

(SENATE) WAYS AND MEANS COMMITTEE MEETING

DATE: March 27, 1991

PLACE: Republican Caucus Room

TIME: 8:00 A.M.

RS00427 C1 Prescriptive Overflow Easements Tominaga

WAYS AND MEANS COMMITTEE

MEETING MINUTES

DATE: March 27, 1991

TIME: 8:00 A.M.

PLACE: Republican Caucus Room

PRESENT: Chairman Tominaga, Senators Sweeney, McLaughlin,
Peavey, Hartung, Twiggs

ABSENT/ EXCUSED: Senator McRoberts

GUESTS: Neil Colwell, Washington Water Power
John Hutchison, Idaho Hospital Ass'n

Chairman Tominaga called the meeting to order at 8:10 A.M.

Senator McLaughlin moved and Senator Sweeney seconded that the minutes of March 21, 1991 be approved as written. By a voice vote, the motion carried.

→ RS00427C1 Prescriptive overflow easement

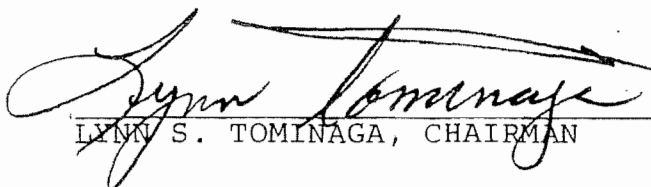
Chairman Tominaga introduced the bill, saying that it was similar to HB346, which had some constitutional problems. This RS would resolve those constitutional problems.

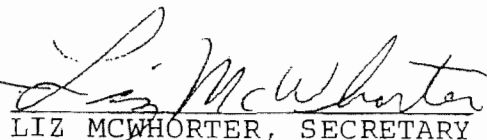
MOTION: Moved by Peavey, seconded by Twiggs, that RS00427C1 be sent to the floor with a DO PASS recommendation. Senator Peavey amended the motion further to state that it be sent to the floor and read into the second reading.

This legislation will take care of Northern Idaho's problem in this regard.

By a voice vote the motion was passed unanimously.

Chairman Tominaga adjourned the meeting at 8:15 A.M.


LYNN S. TOMINAGA, CHAIRMAN


LIZ MCWHORTER, SECRETARY

IDAHO HOUSE OF REPRESENTATIVES

WAYS & MEANS COMMITTEE

First Session - 51st Legislature

Minutes for meeting dated: March 29, 1991

House Majority Caucus Room

Attendees: Representatives Montgomer, Newcomb, Mahoney
Representatives Stoicheff, Black(27), Lasuen
Chairman Danielson

The meeting was called to order by Chairman Danielson at 5:35pm.

The following Senate bills were presented for consideration:

S1250 RELATING TO THE CONTINUANCE OF ADMINISTRATIVE RULES

Representative Stoicheff moved and Representative Newcomb seconded the motion that S1250 be referred from committee with a DO PASS recommendation and recommended to the second reading calendar. The motion carried unanimously. Rep. Simpson will sponsor the bill.

S1251 RELATING TO EASEMENTS ON SUBMERGED LANDS

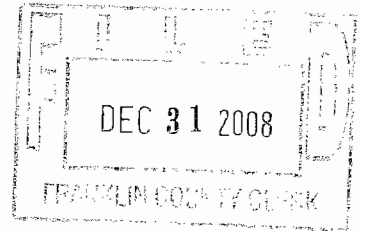
Representative Newcomb moved and Representative Stoicheff seconded the motion that S1251 be referred from committee with a DO PASS recommendation and recommended to the second reading calendar. The motion carried unanimously. Rep. Duncan will sponsor the bill.

S1252 RELATING TO CERTAIN HEALTH & WELFARE PROGRAMS/APPROPRIATIONS FOR FY92

Representative Newcomb moved and Representative Mahoney seconded the motion that S1252 be referred from committee with a DO PASS recommendation and recommended to the second reading calendar. The motion carried unanimously. Representative Newcomb will sponsor the bill.

S1140 RELATING TO FISH & GAME FEES IN LIEU OF TAX

Representative Montgomery moved and Representative Stoicheff seconded the motion that S1140 be referred from committee with a DO PASS recommendation and recommended to the second reading calendar. The motion carried unanimously. Representative Jones(29) will sponsor the bill.



IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

TWIN LAKES CANAL COMPANY,
an Idaho Corporation,

Plaintiff(s),

vs

WARREN CHOULES, an individual and
SESSILEE J. CHOULES, as Trustee of
the Choules Family Trust,

Defendant(s).

Case No. CV-2008-275

MINUTE ENTRY AND ORDER

DATE: December 11, 2008

APPEARANCES: Robert L. Harris, Attorney for Plaintiff
Blake S. Atkin, Attorney for Defendants
Steven Craft, Attorney for Defendants

MATTERS BEFORE THE COURT: Status

PROCEEDINGS: This matter came for hearing on the Courts Order for Scheduling Conference. Plaintiff was represented by counsel Robert L. Harris. Defendant was represented by Blake S. Atkin and Steven Craft. At this time the status of this case was discussed. Defendants advised that an association of counsel was forthcoming whereby Blake Atkins would associate with Michael Moore and Steven Craft in the defense of this matter.

Defendants advised that they would be proceeding with their motion to dismiss. Defendants were advised to notice this matter up for hearing on Defendant was advised to

reschedule this matter for hearing on **February 12, 2009 at 3:00 p.m.** The parties were advised to also file the appropriate Notice of Appearance.

DATED this 31st day of December, 2008



MITCHELL W. BROWN
District Judge

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on the 31st day of December, 2008, I mailed/served/faxed a true copy of the foregoing document on the attorney(s)/person(s) listed below by mail with correct postage thereon or causing the same to be hand delivered.

Attorney(s)/Person(s):

Method of Service:

Robert L. Harris
Attorney for Plaintiff

Faxed: 523-9518

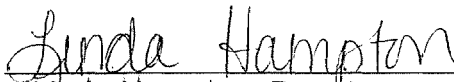
Blake S. Atkin
Attorney for Defendants

Faxed: 1-801-533-0380

Michael Moore
Steven Craft
Attorneys for Defendants

Faxed: 1-208-336-7031

V. ELLIOTT LARSEN, Clerk

BY: 
Linda Hampton, Deputy

Blake S. Atkin (ISB# 6903)
7579 North Westside Highway
Clifton, Idaho 83228
Telephone: (208) 747-3414

ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Bountiful, Utah 84010
Telephone: (801) 533-0300
Facsimile: (801) 533-0380
Email: batkin@atkinlawoffices.net

Attorney for Defendant

FILED

09 JAN -8 PM 2: 27

FRANKLIN COUNTY CLERK

K. Jones

DEPUTY

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
FRANKLIN COUNTY, STATE OF IDAHO

TWIN LAKES CANAL COMPANY, an
Idaho Corporation,
Plaintiff,

vs.

WARREN CHOULES, an individual, and
SESSILEE J. CHOULES, as Trustee of the
Choules Family trust,

Defendants.

NOTICE OF HEARING ON MOTION TO
DISMISS

Case No. cv-08-275

Please take notice that Defendants Motion to Dismiss will be heard on February 12, 2009,
at 3:00 p.m. at the Franklin County Courthouse.

DATED this 8th day of January, 2009.

ATKIN LAW OFFICES, P.C

Blake S. Atkin

Blake S. Atkin
Attorney for Defendants

MAILING CERTIFICATE

I HEREBY CERTIFY that on the 8th day of January, 2009, I served a copy of the foregoing **NOTICE OF HEARING** on each of the following by the method indicated below:

Sixth Judicial District Court
39 West Oneida
Preston, Idaho 83263
Telephone: (208) 852-0877
Facsimile: (208) 852-2926

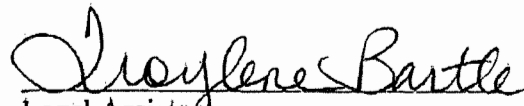
☐ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☒ Facsimile

Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, Idaho 83405-0130
Phone: (208) 523-0620
Facsimile: (208) 523-9518

☐ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☒ Facsimile

Judge Mitchell Brown
Judge's Chambers
Soda Springs, Idaho
Facsimile: (208) 547-2147

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☒ Facsimile

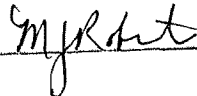

Legal Assistant

FILED

09 JAN 16 AM 10:49

FRANKLIN COUNTY CLERK

Blake S. Atkin (ISB# 6903)
7579 North Westside Highway
Clifton, Idaho 83228
Telephone: (208) 747-3414


DEPUTY

ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Bountiful, Utah 84010
Telephone: (801) 533-0300
Facsimile: (801) 533-0380
Email: batkin@atkinlawoffices.net

Attorney for Defendant

**IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
FRANKLIN COUNTY, STATE OF IDAHO**

TWIN LAKES CANAL COMPANY, an
Idaho Corporation,
Plaintiff,

vs.

WARREN CHOULES, an individual, and
SESSILEE J. CHOULES, as Trustee of the
Choules Family trust,

Defendants.

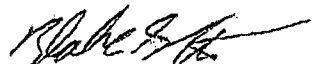
**NOTICE OF HEARING ON MOTION TO
DISMISS**

Case No. cv-08-275

Please take notice that Defendants Motion to Dismiss will be heard on February 12, 2009,
at 3:00 p.m. at the Franklin County Courthouse.

DATED this 8th day of January, 2009.

ATKIN LAW OFFICES, P.C


Blake S. Atkin
Attorney for Defendants

MAILING CERTIFICATE

I HEREBY CERTIFY that on the 16th day of January, 2009, I served a copy of the foregoing **NOTICE OF HEARING ON MOTION TO DISMISS** on each of the following by the method indicated below:

Sixth Judicial District Court
39 West Oneida
Preston, Idaho 83263
Telephone: (208) 852-0877
Facsimile: (208) 852-2926

☐ U.S. Mail, postage prepaid
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Judge Mitchell Brown
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☒ Facsimile

Michael W. Moore
Steven R. Kraft
Moore, Baskin & Elia, LLP
PO Box 6756
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☐ Overnight Mail
☒ Facsimile

LINDSEY ST
Paralegal

ORIGINAL

MICHAEL W. MOORE (ISBN 1919)
STEVEN R. KRAFT (ISBN 4753)
MOORE, BASKIN & ELIA, LLP
Post Office Box 6756
Boise, Idaho 83707
Telephone: (208) 336-6900
Facsimile: (208) 336-7031

FILED

09 FEB -9 AM 10:36

FRANKLIN COUNTY CLERK

Kfomer

DEPUTY

Attorneys for Defendants Warren and Sessilee Choules

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

TWIN LAKES CANAL COMPANY,)
an Idaho corporation,)

Plaintiff,)

vs.)

WARREN CHOULES, an individual,)
and SESSILEE J. CHOULES, as)
Trustee of the Choules Family Trust,)

Defendants.)
_____)

) Case No. CV-2008-275

) **DEFENDANTS' REPLY BRIEF IN**
) **SUPPORT OF MOTION TO DISMISS**
) **DAMAGE CLAIMS**

ARGUMENT

Defendants' pending Motion to Dismiss is based on Idaho Code §5-246. Said code section addresses prescriptive overflow easements, like that at issue in this case, and has been in effect since 1991. Idaho Code §5-246 describes the requirements for dam owners to

**DEFENDANTS' REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS DAMAGE CLAIMS - P. 1**

obtain a prescriptive overflow easement, and setting such overflow easements apart from other prescriptive easements in regard to what is necessary to obtain such an easement. Additionally, after setting forth the requirements for a prescriptive overflow easement, the Idaho Legislature added the following specific language:

The provisions of this section shall not be construed to . . . restrict any use of the underlying property for any purpose otherwise consistent with ownership thereof, even if said use interferes with the storage of water on the property. (Emphasis added)

Based upon the plain language of §5-246, it is apparent that the Idaho Legislature intended prescriptive overflow easements to be viewed differently than other easements.

Plaintiff's opposition brief does not deny that I.C. § 5-246 applies to the overflow easement involved in this matter. Instead, Plaintiff asserts that this Court should ignore the plain language of the statute, and instead treat the overflow easement at issue in this case like any other easement, applying common law rules even though the language of the statute unmistakably states something different. Plaintiff presents a description of the correlative rights of dominant and serviant estates and easements under the common law, arguing that Idaho law prohibits "unreasonable" interference with the full use and enjoyment of an easement. Plaintiff cites several Idaho cases supporting this proposition. Based upon said common law approach, Plaintiff asserts that as an easement owner, it is entitled to relief upon a showing that the landowner/serviant estate "unreasonably" interfered with the easement. In so doing, Plaintiff completely ignores the plain language of I.C. § 5-246.

The cases presented in Plaintiff's brief are factually distinguishable in that none of the cases address a situation involving a prescriptive overflow easement, like that in this case. Consequently, none of these cases discuss the application of I.C. § 5-246. Instead, the cases relied on by Plaintiff address other types of easements, easements not subject to the language of § 5-246. This is a critical distinction.

Plaintiff understands this critical distinction and spends a great deal of time trying to argue away I.C. § 5-246. Plaintiff asserts that no specific intent of the Idaho Legislature to treat prescriptive overflow easements differently than other easements can be garnered from the actual language of I.C. § 5-246. Plaintiff also asserts that the statutory language itself makes no distinction between prescriptive overflow easements and any other type of easements. Plaintiff's assertions are incredulous in that they simply ignore the plain language of the statute. Further, if the Legislature did not intend to distinguish prescriptive overflow easements from other easements, there would be absolutely no need for the statute. The statute exists only to provide distinctions for this type of easement.

The starting point for any statutory interpretation is the literal wording of the statute, and where the language of the statute is unambiguous, there is no need to consult extrinsic evidence. See e.g. *State v. Mubita*, 188 P.3d 867, 882 (Idaho 2008). In this case, regardless of Plaintiff's attempt to create ambiguity, the language set forth in the statute is crystal clear. The obvious intent of the statute is to distinguish prescriptive overflow easements from other types of easements, unless we are to assume that the Idaho Legislature undertook a

completely meaningless act and enacted a statute that has absolutely no purpose other than to restate the already well-settled common law approach to easements. The statute provides a prescriptive overflow easement for dam owners which does not require consistent water levels that was previously required in order to obtain a common law prescriptive easement. In addition to distinguishing prescriptive overflow easements from other easements, the Legislature also added language providing additional protection to the real property rights of the owner of the underlying ground affected by the overflow easement. The language states in unambiguous terms that the provisions of I.C. § 5-246 shall not be construed to restrict any use of the underlying property for any purpose otherwise consistent with ownership thereof, even if said use interferes with the storage of water on the property. I.C. § 5-246. (Emphasis added). This language would be completely unnecessary if there was no intent to provide protection to the underlying property owner different than the rights found at common law.

As stressed in Plaintiff's brief, courts must construe a statute under the assumption that the Legislature knew of all legal precedent and other statutes in existence at the time the statute was passed. (Plaintiff's Memo in Opposition, pp. 8-9; citing *D&M Country Estates Homeowners' Association v. Romriell*, 138 Idaho 160, 165, 59 P.3d 965, 970 (2002). Therefore, the Legislature is assumed to have known of the legal precedent allowing use of the servient estate only if it does not "unreasonably" interfere with the dominant estate's full enjoyment of the easement. Had the Legislature not intended something different than that

which already existed in the common law when it enacted I.C. § 5-246, there would be no need for the statutory language clearly stating that in the arena of prescriptive overflow easements, the real property owner is not restricted as to any use of the underlying property for any purpose . . . even if said use interferes with the easement [storage of water on the property].

Plaintiff's sole complaint in regard to its overflow easement in this case is that Defendants' alleged actions interfere with the storage of water on Defendants' property. According to the plain language of I.C. § 5-246, Defendants can undertake any use of the underlying property for any purpose, even if, as claimed by Plaintiff, that use interferes with the storage of water on underlying property.

Lastly, as set forth in Defendants' prior pleading, it is Defendants' position that Plaintiff cannot be granted injunctive relief in this case because it has incurred no right under the statute to be free from Defendants' use of the underlying real property. Consequently, a preliminary injunction on this matter is not proper because Plaintiff cannot establish a substantial likelihood of success on the merits and is therefore not entitled to the relief demanded.

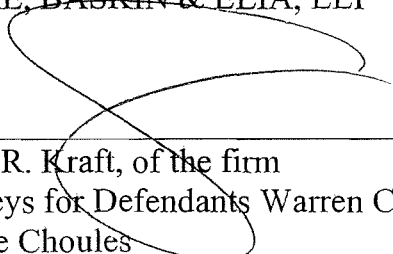
CONCLUSION

Based upon the plain language of Idaho Code § 5-246, Defendants have a right to make any use of their underlying real property for any purpose, even if it interferes with the storage of water on said property. Consequently, Plaintiff cannot show that Defendants have

caused it injury from which there is protection. Defendants respectfully request that Plaintiff's claims for damages be dismissed, that Plaintiff's claim for a preliminary injunction be dismissed, and that Defendants be awarded their attorneys fees in bringing this motion.

Dated this 5th day of February, 2009.

MOORE, BASKIN & ELIA, LLP

By 
Steven R. Kraft, of the firm
Attorneys for Defendants Warren Choules and
Sessilee Choules

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 5th day of February, 2009, I served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

Robert L. Harris
Holden, Kidwell, Hahn & Carpo,
PLLC
1000 Riverwalk Dr., Ste. 200.
P. O. Box 50130
Idaho Falls, ID. 83405-0130

☒ U.S. Mail, postage prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile Transmission 208-523-9518
☐ E-Mail

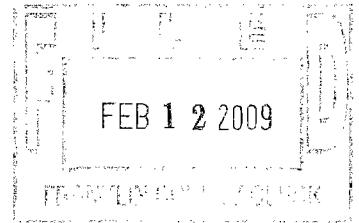
Blake Atkin
Atkin Law Offices, PC
837 South 500 West, Suite 200
Bountiful, UT 84010

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☐ Overnight Mail
☐ Facsimile Transmission 801-533-0380
☐ E-Mail



Steven R. Kraft

DEFENDANTS' REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS DAMAGE CLAIMS - P. 6



IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

TWIN LAKES CANAL COMPANY,
an Idaho Corporation,

Plaintiff(s),

vs

WARREN CHOULES, an individual and
SESSILEE J. CHOULES, as Trustee of
the Choules Family Trust,

Defendant(s).

Case No. CV-2008-275

MINUTE ENTRY AND ORDER

DATE: February 12, 2009

APPEARANCES: Robert L. Harris, Attorney for Plaintiff
Blake S. Atkin, Attorney for Defendants
Steven Craft, Attorney for Defendants

MATTERS BEFORE THE COURT: Motion to Dismiss

PROCEEDINGS: This matter came for hearing as regularly scheduled for hearing on Defendant's Motion to Dismiss. The Court heard argument from counsel and took this matter under advisement.

DATED this 12th day of February, 2009.

MITCHELL W. BROWN
District Judge

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on the 23rd day of February, 2009, I mailed/served/faxed a true copy of the foregoing document on the attorney(s)/person(s) listed below by mail with correct postage thereon or causing the same to be hand delivered.

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V. ELLIOTT LARSEN, Clerk

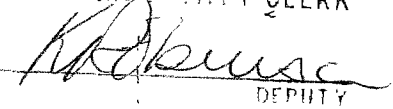
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FRANKLIN COUNTY CLERK


 DEPUTY

Attorneys for Defendants Warren and Sessilee Choules

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

TWIN LAKES CANAL COMPANY,)
 an Idaho corporation,)

Plaintiff,)

vs.)

WARREN CHOULES, an individual,)
and SESSILEE J. CHOULES, as)
Trustee of the Choules Family Trust,)

Defendants.)

Case No. CV-2008-275

DEFENDANTS' ANSWER TO
PLAINTIFF'S AMENDED VERIFIED
COMPLAINT

COME NOW Defendants , above-named, by and through their attorneys of record,
Moore, Baskin & Elia, LLP, and, in response to the Amended Verified Complaint on file
herein, admit, deny and allege as follows:

DEFENDANTS' ANSWER TO PLAINTIFF'S AMENDED VERIFIED COMPLAINT - P. 1

FIRST OFFENSE

Defendants deny all allegations of Plaintiff's Amended Verified Complaint not specifically admitted herein.

SECOND OFFENSE

Plaintiff's Amended Verified Complaint fails to state a claim against these Defendants upon which relief can be granted.

THIRD DEFENSE**I**

Defendants lack sufficient information and belief to respond to the allegations contained in Paragraph 1 of Plaintiff's Amended Verified Complaint, and therefore deny the same at this time pursuant to I.R.C.P. Rule 8(b).

II

That as to the allegations contained in Paragraph 2 of Plaintiff's Amended Verified Complaint, Defendants admit that Warren Choules and Sessilee J. Choules reside in Franklin County, Idaho. That Defendants deny all other allegations in said paragraph.

III

Defendants deny the allegations contained in Paragraph 3 of Plaintiff's Amended Verified Complaint.

IV

Defendants admit the allegations contained in Paragraphs 4 and 5 of Plaintiff's Amended Verified Complaint.

V

That to the allegations contained in Paragraph 6 of Plaintiff's Amended Verified Complaint, these Defendants reassert their responses to Paragraphs 1-5 and incorporate the same by reference as applicable.

VI

That these Defendants admit the allegations contained in Paragraphs 7, 8, 9 and 10 of Plaintiff's Amended Verified Complaint.

VII

That as to the allegations contained in Paragraph 11 of Plaintiff's Amended Verified Complaint, these Defendants admit that by way of Judgment dated May 17, 2006 in case number CV-04-241, District Judge Don Harding ruled that Twin Lakes Canal Company had a prescriptive easement to fill the Twin Lakes Reservoir to a gauge height of 75.2 ft as measured on the south dam of the reservoir, and that the water level in Twin Lakes Reservoir shall not exceed gauge height of 75.2 ft. These Defendants deny all other allegations contained in Paragraph 11.

VIII

That as to the allegations contained in Paragraph 12 of Plaintiff's Amended Verified Complaint, these Defendants admit that the Court in Franklin County case No. CV-04-21

held that Twin Lakes has a prescriptive easement to establish and use the canal across the Choules' property and that any conduct on the part of the Choules that prohibits or interferes with that right would be impermissible. Defendants further admit that said Court also stated that the Choules may not place a fence across the canal if it would interfere with Twin Lakes' normal use of the canal easement. These Defendants deny all other allegations contained in Paragraph 12 of Plaintiff's Amended Verified Complaint.

IX

That Defendants lack sufficient information and belief to respond to the allegations contained in Paragraph 13 of Plaintiff's Amended Verified Complaint, and therefore deny the same at this time pursuant to I.R.C.P. Rule 8(b).

X

That Defendants deny the allegations contained in Paragraphs 14, 15, and 16 of Plaintiff's Amended Verified Complaint.

XI

That Defendants lack sufficient information and belief to respond to the allegations contained in Paragraphs 17, 18 and 19 of Plaintiff's Amended Verified Complaint, and therefore denies the same at this time pursuant to I.R.C.P. Rule 8(b).

XII

That Defendants deny the allegations contained in Paragraph 20 of Plaintiff's Amended Verified Complaint.

XIII

That Defendants lack sufficient information and belief to respond to the allegations contained in Paragraphs 21, 22, 23, 24, 25 and 26 of Plaintiff's Amended Verified Complaint, and therefore deny the same at this time pursuant to I.R.C.P. Rule 8(b).

XIV

That Defendants deny the allegations contained in Paragraphs 27, 28, 29, 30 and 31 of Plaintiff's Amended Verified Complaint.

COUNT I: CONDEMNATION**XV**

That as to the allegations contained in Paragraph 32 of Plaintiff's Amended Verified Complaint, these Defendants reassert their responses to Paragraphs 1-31 and incorporate the same by reference where applicable.

XVI

That the allegations contained in Paragraphs 33, 34 and 35 of Plaintiff's Amended Verified Complaint are questions of law for the court to determine, and no response is required of these Defendants.

XVII

That Defendants deny the allegations contained in Paragraphs 36, 37, 38, 39, 40 and 41 of Plaintiff's Amended Verified Complaint.

COUNT II: PRELIMINARY INJUNCTION**XVIII**

That as to the allegations contained in Paragraph 42 of Plaintiff's Amended Verified Complaint, these Defendants reassert their responses to Paragraphs 1-41 and incorporate the same by reference where applicable.

XIX

That Defendants deny the allegations contained in Paragraphs 43, 44, 45 and 46 of Plaintiff's Amended Verified Complaint.

COUNT III: DAMAGES**XX**

That as to the allegations contained in paragraph 47 of Plaintiff's Amended Verified Complaint, these Defendants reassert their responses to Paragraphs 1-46 and incorporate the same by reference where applicable.

XXI

That these Defendants deny the allegations contained in Paragraph 48 of Plaintiff's Amended Verified Complaint.

AFFIRMATIVE DEFENSES

That at the time of the filing this Answer, these Defendants have not been able to engage in discovery and lack sufficient information and belief as to all of those affirmative defenses that might apply in this instance. At this time, pursuant to Rule 12, I.R.C.P., these Defendants assert the following defenses so that the same are not waived. If factual

information is not developed sufficient to support any specific affirmative defense, the affirmative defense in question will be withdrawn.

FIRST AFFIRMATIVE DEFENSE

That Plaintiff cannot establish that the proposed taking is necessary to the intended use.

SECOND AFFIRMATIVE DEFENSE

That under Idaho Code § 5-246, Plaintiff's overflow easement cannot restrict any use of the underlying property for any purpose otherwise consistent with ownership thereof, even if said use interferes with the storage of water on the property.

THIRD AFFIRMATIVE DEFENSE

That without admitting any responsibility on the part of Defendants for any of the matters set forth in Plaintiff's Amended Verified Complaint, which Defendants specifically deny, Defendants assert that the incidents described in Plaintiff's Amended Verified Complaint were due to the negligence and/or careless conduct of other persons or entities, including Plaintiff, for whom Defendants are not responsible.

FOURTH AFFIRMATIVE DEFENSE

That Plaintiff has failed to mitigate its damages.

FIFTH AFFIRMATIVE DEFENSE

That the Plaintiff's damages, if any, were proximately caused, in whole or in part, by the superseding, intervening acts and/or omissions of Plaintiff, and/or other persons not a party to this action.

SIXTH AFFIRMATIVE DEFENSE

Twin Lakes condemnation claims are barred by the doctrines of waiver, estoppel and laches.

SEVENTH AFFIRMATIVE DEFENSE

Twin Lakes cannot maintain its condemnation cause of action because it seeks condemnation for an improper purpose.

EIGHTH AFFIRMATIVE DEFENSE

Twin Lakes cannot pursue condemnation because the decision to pursue condemnation was made ultra vires.

NINTH AFFIRMATIVE DEFENSE

Twin Lakes cannot be allowed to pursue condemnation unless and until it demonstrates that it has the means to purchase Defendant's property at a value consistent with its highest and best use.

TENTH AFFIRMATIVE DEFENSE

At the time of filing this Answer, Defendants have not been able to engage in discovery and request they be permitted to amend this Answer and to assert further affirmative defenses once they are identified.

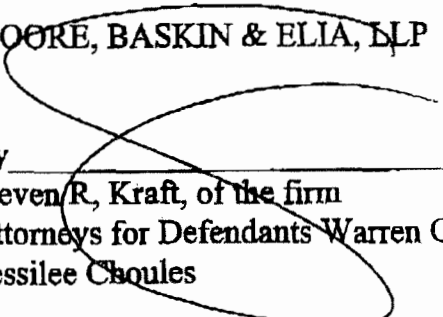
WHEREFORE, Defendants pray for judgment against Plaintiff dismissing Plaintiff's Amended Verified Complaint with prejudice and granting Plaintiff none of the relief prayed for therein, granting Defendants their attorneys fees and costs, and granting Defendants such other and further relief that this court deems just.

DEMAND FOR JURY TRIAL

Defendants request that this matter be tried by a jury.

Dated this 11th day of February, 2009.

MOORE, BASKIN & ELIA, LLP

By 
Steven R. Kraft, of the firm
Attorneys for Defendants Warren Choules and
Sessilee Choules

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 11th day of February, 2009, I served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

Robert L. Harris
Holden, Kidwell, Hahn & Carpo,
PLLC
1000 Riverwalk Dr., Ste. 200
P. O. Box 50130
Idaho Falls, ID. 83405-0130

☒ U.S. Mail, postage prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile Transmission 208-523-9518
☐ E-Mail


Steven R. Kraft

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

FILED

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FRANKLIN COUNTY CLERK

L Hampton
DEPUTY

TWIN LAKES CANAL COMPANY, an
Idaho Corporation,
Plaintiff,

vs.

WARREN CHOULES, an individual, and
SESSILEE J. CHOULES, Trustee of the
Choules Family Trust,
Defendants.

) Case No. CV-2008-275

) **MEMORANDUM DECISION AND**
) **ORDER ON DEFENDANTS'**
) **MOTION TO DISMISS**

This matter came before the Court as regularly scheduled for hearing on Defendants', Warren Choules and Sessillee J. Choules, as Trustee of the Choules Family Trust ("Choules"), Motion to Dismiss Amended Verified Complaint for Failure to State a Claim upon which Relief May be Granted. This motion was filed on September 5, 2009 and was brought pursuant to Idaho Rule of Civil Procedure 12(b)(6). The Plaintiff was represented by Robert L. Harris and the Defendants were represented by Blake Atkin and Steven R. Kraft. This matter was argued to the Court on February 12, 2009. At the conclusion of oral arguments the Court took the matter under advisement.

COURSE OF PROCEEDINGS

Plaintiff, Twin Lakes Canal Company ("Twin Lakes"), initiated the present lawsuit by filing a Verified Complaint and Request for Injunctive Relief on July 23, 2008. Incident to the

filing of the Complaint, Plaintiff's also sought a preliminary injunction. Following a hearing on August 14, 2008, the Court entered a Temporary Restraining Order enjoining the Choules from engaging in any "further equipment work ... on the property ... until further order of the Court." By stipulation of the parties, this temporary order was extended "until further order of the Court" pursuant a Minute Entry and Order dated September 4, 2009.

On August 26, 2008, Twin Lakes filed an Amended Verified Complaint for Condemnation and Request for Preliminary Injunctive Relief. This amended complaint raises three (3) causes of action against the Choules. In Count I, Twin Lakes seeks to "exercise the power of eminent domain" to condemn the Choules property for "reservoirs, canals, and ditches." Count I is brought pursuant to Idaho Code §§ 7-701 to 7-721. Count II requests a preliminary injunction against the Choules and Count III seeks monetary damages from the Choules.

Twin Lakes' complaint asserts that it has an easement that allows it to fill Twin Lakes Reservoir to gauge height 75.2. This results in an overflow onto the Choules property. Plaintiff asserts that the Choules have undertaken activities on their property which interfere with its established easement, specifically "using heavy equipment to move earth, rocks, concrete, and other debris from elsewhere on the Subject Property to areas below gauge height 75.2 in Twin Lakes Reservoir." Twin Lakes argues that this activity by the Choules reduces "the volume of space that Twin Lakes can use to store water for its shareholders. Twin Lakes also asserts that the "use of heavy equipment below gauge height 75.2 ... has damaged a clay lining which Twin Lakes previously installed to plug a leak in the Twin Lakes Reservoir.

Twin Lakes also argues that the Choules are interfering with its prescriptive easement across the Choules property in which it operates and maintains a canal. Twin Lakes asserts that Choules has "performed work on the Subject Property above the level of Twin Lakes Reservoir,

but directly below the Twin Lakes Canal." Twin Lakes further complains that the canal is "located on a very sensitive area of the Subject Property, as it traverses a steep gradient, and requires support below it to exist" and "the removal of support material below the canal substantially increases the risk of a canal washout."

As such Twin Lakes asserts that Choules' activities unreasonably interfere with its enjoyment of its easement. Twin Lakes argues further that Defendant's activities should be permanently enjoined and that it should recover any damages it may have incurred as a result of the Choules interfering with its easements.

Choules, on September 5, 2008, moved to dismiss Counts II and III of Plaintiff's Amended Complaint. The Choules assert that the Plaintiff has failed to state a claim upon which relief may be granted as relates to Counts II and III. Choules argues that an overflow easement, which is a statutory creation pursuant to Idaho Code § 5-246, allows Choules to use the servient property consistent with ownership thereof and without regard to the overflow easement. Choules points to the language of I.C. § 5-246 as authority for this position where it states that "the provisions of this section shall not be construed to affect the riparian and littoral rights of property owners to have access to and use of the waters in this state, or to restrict any use of the underlying property for any purpose otherwise consistent with ownership thereof, even if said use interferes with the storage of water on the property."

STANDARD OF REVIEW

Idaho Rule of Civil Procedure 12 provides that "every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following

defenses shall be made by motion." Failure to state a claim upon which relief can be granted is one of the enumerated defenses that must be brought by a motion. I.R.C.P. 12(b)(6).

If the motion to dismiss is accompanied by factual matters outside of the pleadings, such as affidavits, the motion shall be treated as "one for summary judgment and disposed of as provided for in Rule 56." I.R.C.P.12(b), *Hellickson v. Jenkins*, 118 Idaho 273, 9796 P.2d 150 (Ct.App. 1990). The Court points out that Plaintiff in responding to the Choules motion to dismiss has not only filed a Memorandum in Opposition to Defendants' Motion to Dismiss but also the Affidavit of Daniel C. Dansie. However, this affidavit is not factual, but merely chronicles his attempt to obtain the legislative history of Idaho Code § 5-246 and provides as an exhibit to that affidavit the legislative history he was able to obtain from the Idaho Legislative Reference Library. In as much as this is legal authority and not factual material, the court will continue to treat this as a motion to dismiss under I.R.C.P. 12(b)(6) rather than a motion for summary judgment under I.R.C.P. 56.

The standard of review for the Court in determining this motion to dismiss brought pursuant to I.R.C.P. 12(b)(6) is set forth in the of *Sumpter v. Holland Relaty, Inc.*, 140 Idaho 349, 93 P.3d 680.

[A]fter viewing all facts and inferences from the record in favor of the non-moving party, the Court will ask whether a claim for relief has been stated. "The issue is not whether the plaintiff will ultimately prevail, but whether the party is 'entitled to offer evidence to support the claims.

140 Idaho at 351.

As such, the Court will review facts contained in the record in favor of the Plaintiff in order to determine whether an appropriate claim for relief has been stated.

ANALYSIS

Twin Lakes has alleged that Choules have interfered with the prescriptive easement both as it relates to the overflow easement related to the Twin Lakes Reservoir and also as it relates to a separate easement for maintenance and use of a canal that "crosses" the Choules property. After closely reviewing the motion and supporting memorandums, as well as hearing the parties arguments on this motion, the Court sees no support in the record that would suggest that Twin Lakes second and third causes of action, as they relate to the canal "crossing" the Choules property, fails to state a claim upon which relief may be granted. Therefore, the Court **DENIES** Choules motion to dismiss as it relates to the claimed interference with the canal which "crosses" the Choules property. This portion of Plaintiff's Amended Complaint may proceed and the existing order enjoining activities relating to the canal system crossing the Choules property remains in full force and effect.

The issue as it relates to the reservoir easement is not as easily disposed of and requires additional analysis. *Baranick v. North Fork Reservoir Co.*, 127 Idaho 482, 903 P.3d 71 (1995) provides a good summary of the state of the common law prior to 1991. The *Baranick*, decision cites to two early decisions, *Deffendbaugh v. Washington W. Power Co.*, 24 Idaho 514, 134 P. 247 (1913), and *Lavin v. Panhandle Lumber Co.*, 51 Idaho 1, 1 P.2d 186 (1931), where operators of dams were unsuccessful in obtaining a prescriptive easement under common law because they could not show that their adverse possession by flooding was continuous and therefore did not trigger the running of the "prescriptive period. 127 Idaho at 483.

In 1991, the Idaho Legislature statutorily created a means whereby the operator of a dam could acquire an easement by prescription. This statute, Idaho Code § 5-246, greatly reduced the showing which was necessary to create an easement by prescription in these circumstances. It

created a situation where a dam operator could acquire an easement in circumstances that he could not have before. See *Deffendbaugh v. Washington W. Power Co.*, 24 Idaho 514, 134 P. 247 (1913), and *Lavin v. Panhandle Lumber Co.*, 51 Idaho 1, 1 P.2d 186 (1931). This statute effectively relaxed the common law elements of acquiring a prescriptive easement in the context of overflow easements by doing away with the requirement that the adverse possession be continuous.

Idaho Code § 5-246 provides as follows:

In conformity with the limitations of actions time period set forth in sections 5-203 through 5-206, Idaho Code, the owner of a dam shall be deemed to have obtained a nonexclusive prescriptive overflow easement over real property which has been inundated or overflowed by the operations of the dam for at least a part of a year for any consecutive five (5) year period prior to commencement of an action by the property owner seeking relief inconsistent with such nonexclusive prescriptive overflow easement. Said dam owner shall be deemed to have not forfeited said nonexclusive prescriptive overflow easement if the reason for the failure to exercise the easement is a lack of water caused by drought or acts of God.

It is further provided that if a dam has inundated or overflowed real property for at least a part of a year for the five (5) consecutive years prior to the enactment of this section, then the owner of the dam shall be deemed to have obtained a nonexclusive prescriptive overflow easement hereunder over said real property one (1) year after the enactment of this section, provided, no action seeking relief inconsistent with such nonexclusive prescriptive overflow easement has been commenced by the property owner within one (1) year of the enactment of this section. **The provisions of this section shall not be construed to affect the riparian and littoral rights of property owners to have access to and use of waters in this state, or to restrict any use of the underlying property for any purpose otherwise consistent with ownership thereof, even if said use interferes with the storage of water on the property.** Nothing herein shall be deemed to affect any prescriptive overflow easement that any dam owner may have previously acquired under common law. The provisions of this section shall not be construed to apply to the beds of navigable waters lying below the natural or ordinary high watermark as defined in subsection (c) of section 58-1302, Idaho Code, and subsection (9) of section 58-104, Idaho Code, or any other lands owned by the state of Idaho. **(Emphasis Added)**

In 2006, Twin Lakes obtained a judgment, pursuant to a jury trial, finding that it had a prescriptive easement allowing it to raise the level of the Twin Lakes Reservoir to gauge height 75.2. It is important to note that this prescriptive easement was established pursuant to elements set forth in Idaho Code § 5-246 and not under the more stringent common law elements addressed in *Baranick v. North Fork Reservoir Co.*, supra.¹ As such the easement obtained by Twin Lakes is a creature of Idaho Code § 5-246 and not of common law.

The Choules argue that the statute is controlling and that the express language of the statute does not restrict the serviant estate property owner from "any use of the underlying property for any purpose otherwise consistent with ownership thereof, even if said use interferes with the storage of water on the property." The Choules argue that this statutory easement does not limit their ability to use the serviant estate consistent with the ownership thereof. They argue that this would include the conduct which is the basis for Twin Lakes complaint in this matter, such as use of heavy equipment to move earth, concrete, or other debris to areas below gauge height 75.2.

Twin Lakes in turn argues that the creation of a less restrictive means of obtaining an overflow easement pursuant to Idaho Code § 5-246 did not change the common law rule that the owner of the serviant estate may not "unreasonably interfere" with the easement.

¹ Both parties seem to acknowledge this fact. Choules clearly argues and contends that Idaho Code § 5-246 controls. Twin Lakes makes no claim that this easement was acquired under the common law and further argues that the only change to the common law that was intended by the legislature was to make the standard for acquiring a prescriptive easement less restrictive by doing away with the "continuous" requirement that generally could not be met in an overflow easement situation.

The Court's initial inquiry with respect to this issue deals with determining whether the statute is clear and unambiguous. The Court begins with the examination of the literal words of the statute. *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214 (1999). "Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction." *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct.App.2003). "A statute is to be construed as a whole without separating one provision from another." *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214 (1999). If the language is clear and unambiguous, statutory construction is unnecessary and courts are free to apply the plain meaning and there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67; *Martin v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 244, 246, 61 P.3d 601, 603 (2002). Ambiguity is not established merely because the parties present differing interpretations to the court. *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992).

In the case at bar the Court has closely reviewed Idaho Code § 5-246. The Court in reviewing this statute concludes that the language of the statute is clear and unambiguous. It appears clear to the Court that the legislature recognized that by enacting § 5-246 it was making the process of acquiring a prescriptive overflow easement easier and less restrictive than under the common law. As such, it appears evident to the Court that the legislature made the prescriptive overflow easement less onerous against the serviant estate than a common law prescriptive easement by providing that it was "non-exclusive" and by providing that despite the easement the serviant property owner could still put the property to "any use ... consistent with ownership of the property."

It is difficult for the Court to read Idaho Code § 5-246 and not conclude that the legislature intended to treat an easement under this section differently than common law prescriptive easements. It is incumbent upon a court to give a statute an interpretation, which will not render it a nullity. *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct.App.2001). If the Court were to follow the logic in Plaintiff's argument it would render the portion of the statute allowing the servient estate owner the right to use the underlying property consistent with ownership thereof a nullity. This is especially true when the next sentence of the statute is examined. This sentence provides that the servient property owner's use is protected even if the use diminishes or interferes with the storage of water. A finding by this Court that only common law applies here would mandate ignoring Idaho Code § 5-246. If the Court were to determine the limitations of the common law were to be applied to the statute then it would nullify the broad authority granted under the statute.

Finally, the Courts must construe a statute "under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed." *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 150, 879 P.2d 1078, 1083 (1994). The Court must presume that the Legislature was aware of the common law limitations on the owner of a servient estate's use of property encumbered by an easement. This assumption in juxtaposition with the plain language of the statute allowing for use, by servient estate holder in these cases, of their property despite interfering with the storage of water on the property is an indication that the legislature intended for this type usage in these types of cases. To hold otherwise would be to ignore the plain language of the Idaho Code §5-246.

In as much as the Court has determined that the express language of Idaho Code § 5-246 is clear and unambiguous, the Court need not resort to legislative history or rules of statutory interpretation. *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67; *Martin v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 244, 246, 61 P.3d 601, 603 (2002). Rather, the Court may merely apply the plain meaning of the statute to the facts of the case at bar.

In this case the Court holds that the express language of Idaho Code § 5-246 is clear and unambiguous. That Twin Lakes upon obtaining a prescriptive overflow easement in 2006 pursuant to Idaho Code § 5-246 acquired only those rights allowed under Idaho Code § 5-246 and not the rights it would have acquired had it obtained a prescriptive easement pursuant to common law. The limitation to the easement Twin Lakes acquired in 2006 is set forth in Idaho Code § 5-246 wherein it clearly states that "the provisions of this section shall not be construed to affect the riparian and littoral rights of property owners to have access to and use of waters in this state, or to restrict any use of the underlying property for any purpose otherwise consistent with ownership thereof, even if said use interferes with the storage of water on the property. [Emphasis Added] As such Twin Lakes does not have the right to curtail Choules' use of the underlying serviant estate as long as such use is consistent with ownership of said property.

CONCLUSION

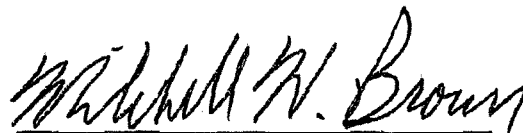
In applying the standard of review relative to Twin Lakes claim for relief in Counts II and III as relates to the **canal** of Twin Lakes which "crosses" the Choules property, the Court concludes that the pleadings set forth a viable claim for relief as relates to Choules unreasonable interference with the prescriptive easement in favor of

the Twin Lakes. As such Choules motion as it relates to Counts II and III of the Amended Complaint, to the extent those Counts deal with the canal system which "crosses" the Choules land is hereby **Denied**. It is further **Ordered** that the Restraining Order dated September 4, 2008 prohibiting the Choules "from using construction equipment on the canal system" shall remain in full force and effect until further order of the Court.

After applying Idaho Code § 5-246 as set forth above, The Court concludes that Twin Lakes has not set forth a claim upon which relief can be granted as relates to the Counts II and III of its amended complaint as those counts relate to the overflow easement and Twin Lakes Reservoir. A review of the facts set forth in the parties pleadings fails to establish that the Choules have done anything with the underlying property that is in any way inconsistent with the ownership of said property. Therefore the Court hereby **Grants** the Defendants' motion to dismiss Counts II and III the Plaintiff's amended complaint as those counts relate to the overflow easement and Twin Lakes Reservoir. It is further **Ordered** that the Restraining Order dated September 4, 2008 prohibiting the Choules "from using construction equipment on reservoir" is **Vacated**.

IT IS SO ORDERED.

DATED this 23 day of March, 2009.


MITCHELL W. BROWN
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date below, I served a true and correct copy of the foregoing document on the attorney(s) or person(s) listed below in the manner indicated.

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☒ Facsimile
☐ Hand Delivered
☐ Court Box

DATED this 23 day of March, 2009.

V. ELLIOTT LARSEN
Clerk of the District Court

By:

Sinda Hampton
Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN
39 West Oneida
Preston, ID 83263

TWIN LAKES CANAL COMPANY,

Plaintiff(s)

vs.

WARREN CHOULES and SESSILEE J. CHOULES,

Defendant(s).

Case No: CV-2008-0000275

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Status Thursday, April 23, 2009 03:00 PM
Judge: Mitchell W. Brown

I certify that copies of this Notice were served as follows on Wednesday, April 01, 2009.

Plaintiff's Counsel: Robert L. Harris
P O Box 50130
Idaho Falls ID 83405
Faxed: 523-9518

Defendants' Counsel: Blake S. Atkin
837 South 500 West
Bountiful UT 84010
Faxed: (801) 533-0380

Michael C Moore
PO Box 6756
Boise ID 83707
Faxed: (208) 336-7031

Dated: Wednesday, April 01, 2009
V. Elliott Larsen
Clerk of the District Court

By: Linda Hampton, Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN
39 West Oneida
Preston, ID 83263

TWIN LAKES CANAL COMPANY,

Plaintiffs

vs.

WARREN CHOULES and SESSILEE CHOULES,

Defendant(s).

Case No: CV-2008-0000275

Amended
NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Scheduling Conference Thursday, May 07, 2009
Judge: Mitchell W. Brown

3:30 pm
~~03:00 PM~~

Telephone conference to be initiated by Robert L. Harris

I certify that copies of this Notice were served as follows on Thursday, April 30, 2009.

Plaintiff's Counsel: ROBERT L. HARRIS, Attorney for Plaintiffs
Faxed: 523-9518

Defendant's Counsel: BLAKE S. ATKIN, Attorney for Defendants
837 South 500 West
Bountiful UT 84010
Faxed: (801) 533-0380

MICHAEL MOORE, Attorneys for Defendants
STEVEN KRAFT
Faxed: (208) 336-7031

Dated: Thursday, April 30, 2009
V. Elliott Larsen
Clerk of the District Court

By: Linda Hampton, Deputy Clerk